

1-1-2000

Disparate Impact Lawsuits Under Title VI, Section 602: Can a Legal Tool Build Environmental Justice

Julia B. Latham Worsham

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/ealr>



Part of the [Environmental Law Commons](#)

Recommended Citation

Julia B. Latham Worsham, *Disparate Impact Lawsuits Under Title VI, Section 602: Can a Legal Tool Build Environmental Justice*, 27 B.C. Env'tl. Aff. L. Rev. 631 (2000),
<http://lawdigitalcommons.bc.edu/ealr/vol27/iss4/3>

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Environmental Affairs Law Review by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

DISPARATE IMPACT LAWSUITS UNDER TITLE VI, SECTION 602: CAN A LEGAL TOOL BUILD ENVIRONMENTAL JUSTICE?

JULIA B. LATHAM WORSHAM*

Over the past decade, environmental justice commentators and advocates increasingly have focused on the role that Title VI of the Civil Rights Act of 1964 could play in remedying environmental problems in communities of color. Specifically, this attention recently has targeted the application of civil rights law to the processes employed by government actors in issuing industrial use facility siting permits and the disparate impacts that these practices have on minorities. Ironically, there is no controlling authority regarding whether such suits legitimately may be brought, or what their requirements and parameters might be. This article explores the development of such suits and probes their potential contours, ultimately suggesting how courts might address such issues as standing, burdens of proof, the elements of the prima facie case, and remedies.

INTRODUCTION

We feel that they are here because we're black. And we are being viewed as powerless, even though we may not be. We're being viewed as being vulnerable. We're being viewed as being politically insignificant. And that's why we believe they are here. We believe that it is environmental racism.¹

—Zulene Mayfield, Chairperson of Chester Residents Concerned
for Quality of Living

For almost twenty years, environmental justice advocates have been exposing and opposing the fact that communities of color bear

* Law Clerk to The Honorable Herbert Y.C. Choy, Senior United States Circuit Judge, United States Court of Appeals for the Ninth Circuit, 2000–01; J.D., William S. Richardson School of Law, 2000; B.A., Macalester College, 1991. Many thanks to Professor Denise Antolini, Jerome Balter of the Public Interest Law Center of Philadelphia, Jean Campbell, Professor Sheila Foster, Seth Galanter at the United States Department of Justice, and Professor Casey Jarman for their interest and assistance. All errors or omissions are my responsibility.

¹ *Morning Edition* (National Public Radio radio broadcast, Sept. 2, 1998) (interview by John Nielson with Zulene Mayfield, Chairperson of Chester Residents Concerned for Quality Living (CRCQL)) (speaking about the presence of numerous waste management plants in her hometown of Chester), available in 1998 WL 3308573.

a disproportionately high burden of environmental hazards.² Community groups and environmental and civil rights attorneys involved in the environmental justice movement have used a number of legal tools in their fight for recognition and eradication of the problem, including a variety of environmental laws,³ civil rights laws,⁴ common law property claims,⁵ and constitutional challenges.⁶ In the early to mid-1990s, environmental justice advocates began to pay heightened attention to the role that Title VI of the Civil Rights Act of 1964 could play in remedying perceived environmental problems.⁷ Over the past two years, this effort has focused on the application of civil rights law to the processes employed by states and local municipalities in issuing industrial use facility siting permits and the potentially disparate impacts these processes impose on minorities.

This article seeks to explore the ongoing debate over private claims brought under Title VI against local agencies for issuing permits to industrial facilities that disproportionately impact minority populations. As awareness of racial disparity in the distribution of locally undesirable land uses (LULUs) grows, and other legal and regulatory actions fail to secure equity, disparate impact litigation under Title VI has become a lightning rod. Environmental advocates both praise and critique it, the United States Department of Justice supports it, and business and local governmental concerns roundly condemn it. But, ironically, there is no controlling authority regarding whether disparate impact lawsuits may even be legitimately brought under Title VI, and, if so, what their requirements and parameters might be. Today, the central open question is this: will Title VI be an effective tool to address environmental racism adequately? Section I of this article briefly summarizes the background of the environ-

² See Michael Fisher, *Environmental Racism Claims Brought Under Title VI of the Civil Rights Act*, 25 ENVTL. L. 285, 286 (1995).

³ See *id.* at 301-09; Luke Cole, *Environmental Justice Litigation: Another Stone in David's Sling*, 21 FORDHAM URB. L.J. 523, 525-30 (1994).

⁴ See Cole, *supra* note 3, at 530-38; Fisher, *supra* note 2, at 311-15.

⁵ See Fisher, *supra* note 2, at 309-10.

⁶ See *id.* at 303-06; Cole, *supra* note 3, at 538-41.

⁷ See Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 834-39 (1993); see generally Cole, *supra* note 3 (placing Title VI type claims third on a four-tier hierarchy of litigation strategies for environmental justice attorneys); Fisher, *supra* note 2 (arguing that Title VI is an effective tool for achieving environmental justice); Steven A. Light & Kathryn R.L. Rand, *Is Title VI a Magic Bullet? Environmental Racism in the Context of Political-Economic Processes and Imperatives*, 2 MICH. J. RACE & L. 1 (1996) (stating that Title VI litigation is limited by the political nature of environmental racism).

mental justice movement and the legal tactics that the movement has used in its attempt to end disparate siting of LULUs. Section II discusses Title VI of the Civil Rights Act of 1964, explaining both its regulatory nature and its potential as a private right of action. Section III explores the contours of private litigation under Title VI and asks whether it can be an effective tool for environmental justice plaintiffs. This article concludes by: (1) acknowledging that, as a civil rights issue, discriminatory siting of objectionable facilities is in its infancy; and (2) posing a series of questions, the answers to which will greatly determine the vitality of Title VI as a tool for environmental justice.

I. FOUNDATION OF THE ENVIRONMENTAL JUSTICE MOVEMENT

United States Environmental Protection Agency (EPA) Administrator Carol Browner reflected in 1998 that "[t]hirty-four years ago, when the Civil Rights Act was adopted, no one fully appreciated that pollution could also be a means for effecting [sic] some communities more than others."⁸ Today, the concept that minorities bear a disproportionate percentage of environmental burdens is at the core of the environmental justice movement.

A. Pursuing Environmental Justice: Origins and Definitions

The modern environmental justice movement traces its roots variously back to either a Texas environmental rights suit filed in 1979,⁹ or a North Carolina citizens' protest in 1982.¹⁰ In the Texas case, attorney Linda McKeever Bullard, on behalf of the residents of Houston's Northwood Manor, brought the nation's first lawsuit that challenged the siting of a waste facility based on violations of the civil rights laws.¹¹ In moving for a preliminary injunction, Ms. Bullard argued that locating a garbage dump in the plaintiffs' mostly African-American community was an act of racial discrimination in violation of Section 1983 of the Civil Rights Act of 1871.¹² Although the court found that the siting decision "seem[ed] to have been insensitive and

⁸ United States Environmental Protection Agency Administrator Carol M. Browner, Remarks at the Environmental Justice Roundtable (July 17, 1998) (transcript available at <<http://www.epa.gov/swerosps/ej/html-doc/ejremark.htm>>).

⁹ See Cole, *supra* note 3, at 523.

¹⁰ See Meredith J. Bowers, *The Executive's Response to Environmental Injustice: Executive Order* 12,898, 1 ENVTL. L. 645, 645-46 (1995).

¹¹ See *Bean v. Southwestern Waste Management Corp.*, 482 F. Supp. 673, 674-75 (S.D. Tex. 1979), *aff'd mem.*, 782 F.2d 1038 (5th Cir. 1986); Cole, *supra* note 3, at 523.

¹² See *Bean*, 482 F. Supp. at 674-75; see also 42 U.S.C. § 1983 (1994).

illogical” and would itself have denied the challenged permit had it been the permitting authority, the court conceded that its role was solely to determine whether the plaintiffs had “established a substantial likelihood of proving that [the Texas Department of Health’s] decision to issue the permit was motivated by purposeful discrimination”¹³ Unable to find a substantial likelihood of purposeful discrimination, the court denied the plaintiffs’ motion for preliminary injunction, but also denied the defendant’s motion to dismiss the suit on grounds of abstention, laches, and absence of state action.¹⁴ While the plaintiffs did not pursue their equal protection claim after the court’s denial of the plaintiffs’ motion for preliminary injunction, the lawsuit served as a catalyst for the legal arm of the environmental justice movement.

The North Carolina event in 1982 is noted not only for its legal action,¹⁵ but also for the predominately African-American community’s protest, modeled after the civil rights protests of the 1960s, against a polychlorinated biphenyl (PCB) landfill.¹⁶ This protest brought national attention to the citizens’ cause in Warren County, North Carolina, and resulted in a United States General Accounting Office (GAO) investigation of the demographics of southeastern communities that contained significant landfills.¹⁷

The 1983 GAO study, *Siting Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities*, was among the first studies to focus on the distribution of environmental risks.¹⁸ The GAO study confirmed a central allegation of the environmental justice movement—the proposition that racial minorities are burdened by a disproportionate amount of these risks.¹⁹ Four

¹³ *Bean*, 482 F. Supp. at 681.

¹⁴ *See id.* at 675, 680–81.

¹⁵ *See Fisher*, *supra* note 2, at 296. The NAACP brought a federal Equal Protection suit in an effort to stop the citing of a polychlorinate biphenyl (PCB) disposal facility in Warren County, North Carolina. *See id.* “PCBs are members of the family of halogenated aromatic hydrocarbons. This family also contains DDT and TCDD (Dioxin), some of the most toxic substances known to life” Bowers, *supra* note 10, at 646 n.5 (quoting Ken Geiser and Gerry Waneck, *PCBs and Warren County*, in *UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR*, 43, 44 (Robert Bullard ed., 1994)).

¹⁶ *See Bowers*, *supra* note 10, at 646.

¹⁷ *See id.* The GAO report was directly requested by Walter Fauntroy, the District of Columbia’s delegate to the U.S. House of Representatives, who was arrested as a participant at the Warren County protests. *See Fisher*, *supra* note 2, at 296.

¹⁸ *See Lazarus*, *supra* note 7, at 801.

¹⁹ *See id.* The GAO study focused on locations of “offsite” hazardous waste landfills (those that are not part of an industrial facility) in the southeastern United States. *See id.* The final study reported that, “[b]lack make up the majority of the population in three of

years later, the United Church of Christ (UC) Commission for Racial Justice conducted a broader study that examined hazardous waste sites across the country and controlled for factors such as urbanization and regional differences.²⁰ The UC study reported that “[a]lthough socio-economic status appeared to play an important role in the location of commercial hazardous waste facilities, race still proved to be more significant.”²¹ In fact, “race was consistently a more prominent factor in the location of commercial hazardous waste facilities than any other factor examined.”²²

The GAO and UC findings received significant publicity and generated a great deal of both support and criticism.²³ In response to growing pressure from academics and government officials, President Bush’s EPA Administrator William K. Reilly eventually established the “Environmental Equity” working group in 1990 to study environmental justice issues.²⁴ EPA’s 1992 *Environmental Equity Report* confirmed the earlier studies, finding that members of minority populations have “disproportionately greater ‘observed and potential exposure’ to environmental pollutants,”²⁵ and this disproportionality could not be explained by income alone. “[A] comparison between poor, African American, and Hispanic percentages shows that these minority groups are more concentrated in [substandard air quality regions] than the poor population in general.”²⁶

Studies such as those conducted by the GAO, UC, and EPA, and the controversy they engendered, led Dr. Benjamin Chavis, head of

the four communities where the landfills are located.” *Id.* (quoting U.S. GEN. ACCOUNTING OFFICE, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES (1983) [hereinafter GAO STUDY]). Additionally, “[a]t least 26 percent of the population in all four communities have income below the poverty level and most of this population is Black.” *Id.* (quoting GAO STUDY, *supra*).

²⁰ See *id.* at 801–02 (citing UNITED CHURCH OF CHRIST COMMISSION FOR RACIAL JUSTICE, TOXIC WASTE AND RACE IN THE UNITED STATES (1987) [hereinafter UC STUDY]). Dr. Benjamin Chavis, head of the United Church of Christ’s Commission on Racial Justice, was also arrested in the Warren County protests. See Fisher, *supra* note 2, at 297.

²¹ Lazarus, *supra* note 7, at 801–02 (quoting UC STUDY, *supra* note 20).

²² Fisher, *supra* note 2, at 297 (quoting UC STUDY, *supra* note 20).

²³ See Lazarus, *supra* note 7, at 802–03.

²⁴ See *id.* at 803–04.

²⁵ *Id.* at 805 (quoting 1 ENVIRONMENTAL EQUITY WORKGROUP, OFFICE OF POLICY, PLANNING, AND EVALUATION, U.S. EPA, ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES, WORKGROUP REPORT TO THE ADMINISTRATOR (June 1992) [hereinafter EPA EQUITY REPORT]).

²⁶ *Id.* (quoting D.R. Wernette & L.A. Nieves, *Breathing Polluted Air: Minorities Are Disproportionately Exposed*, 18 EPA J. 16, 17 (1992)).

the UC's Commission of Racial Justice, to coin the phrase "environmental racism"²⁷ in 1993 to describe this disproportionate environmental impact on racial minorities. Dr. Chavis defined the term:

Environmental Racism is . . . racial discrimination in environmental policy making and the unequal enforcement of environmental laws and regulations. It is the deliberate targeting of people of color communities for toxic waste facilities and the official sanctioning of life-threatening presence of poisons and pollutants in people of color communities.²⁸

Professor Robert Bullard, Director of the Environmental Justice Resource Center at Clark Atlanta University and a prolific commentator on environmental justice issues, proffered a less intent-focused definition of environmental racism and emphasized the unequal *results* of the practice:²⁹

[A]ny policy, practice, or directive that, *intentionally or unintentionally*, differentially impacts or disadvantages individuals, groups, or communities based on race or color; [as well as the] exclusionary and restrictive practices that limit participation by people of color in decision-making boards, commissions, and staffs.³⁰

Although the environmental justice movement has been building momentum over the last decade, it is not without challengers.³¹ Those who question the assumptions of the movement cite studies that have

²⁷ See Fisher, *supra* note 2, at 289.

²⁸ *Id.* (quoting *Environmental Racism: Hearings Before the House Subcomm. on Civil and Constitutional Rights*, 103d Cong., 1st Sess. (Mar. 3, 1993) (testimony of Dr. Benjamin F. Chavis, Jr.)).

²⁹ See *id.* at 290. Dr. Robert Bullard is married to Linda McKeever Bullard, the attorney who represented the Northwood Manor community in *Bean v. Southwestern Waste Management*, 482 F. Supp. 673 (S.D. Tex. 1979). See *supra* text accompanying notes 9–14; Cole, *supra* note 3, at 539.

³⁰ Fisher, *supra* note 2, at 289–90 (quoting Robert D. Bullard, *Environmental Equity: Examining the Evidence of Environmental Racism*, LAND USE F., Winter 1993, at 6) (citations omitted)).

³¹ See generally Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383 (1994) [hereinafter Been, *Market Dynamics*]; Vicki Been, *What's Fairness Got To Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001 (1993) [hereinafter Been, *Fairness*]; Daniel Kevin, "Environmental Racism" and *Locally Undesirable Land Uses: A Critique of Environmental Justice Theories and Remedies*, 8 VILL. ENVTL. L.J. 121 (1997) (examining some of the assumptions supporting the environmental justice movement by considering the allegation of impact on minority communities).

found that race is not an independent predictor of adverse environmental impacts,³² and both critics and advocates alike have questioned the methodology of some studies frequently cited by environmental justice advocates.³³ Critics have also challenged the underlying assumption that disparity is necessarily indicative of racial prejudice, and stress that factors other than racism can account for distributional imbalances in the siting of facilities.³⁴ Any legal approach that seeks to remedy environmental racism will need to confront these arguments.

³² See Kevin, *supra* note 31, at 133–34 (citing Douglas A. Anderton, et al., *Hazardous Waste Facilities: "Environmental Equity" Issues in Metropolitan Areas*, 18 EVALUATION REV. 123, 129 (1994)). The Anderton study looked at hazardous waste treatment, storage, and disposal facilities in the United States that opened before 1990 and were still operating in 1992. *See id.* The study indicated that there were no statistically significant differences in percentages of African Americans and Latinos in census tracts with such LULUs and in those without. *See id.* at 134. While the Anderton study found a correlation between socioeconomic factors (such as lower employment rate for men, industrial employment, and lower property values) and siting, it concluded that there was no correlation between the presence of minorities and the presence of these facilities. *See id.*; *see also* Major Willie A. Gunn, *From the Landfill to the Other Side of the Tracks: Developing Empowerment Strategies to Alleviate Environmental Injustice*, OHIO N.U. L. REV. 1227, 1239–40 (1996) (citing Tracy Yandle, Study Presented at the Air and Waste Management Association Annual Meeting (Summer 1993) (unpublished manuscript, on file with Major Gunn)). The Yandle study found that poorer communities in metropolitan areas of Texas were more likely to contain hazardous landfills than were more affluent areas. *See id.* However, it also found that landfills were statistically more likely to be in majority communities, rather than in minority communities. *See id.* This result may have been significantly impacted by the fact that the Yandle study classified "Hispanics" as members of the majority community, and that Texas has a Latino population of approximately twenty-five percent. *See id.*

³³ See Kevin, *supra* note 31, at 134–37. Mr. Kevin, an environmental analyst at the Ernest Orlando Lawrence Berkley National Laboratory, makes his own challenges to the UC and GAO studies, among others, but also cites criticism of the UC study made by some environmental justice advocates. *See id.* at 135 n.72 (citing Michael B. Gerrard, *Fear and Loathing in the Siting of Hazardous and Radioactive Waste Facilities: A Comprehensive Approach to a Misperceived Crisis*, 68 TUL. L. REV. 1047, 1130 (1994); Lazarus, *supra* note 7, at 857 n.56)). Mr. Kevin's key criticisms of the UC study include the use of zip codes in defining the geographically affected area, the use of current demographics rather than demographics reflecting the population at the time facilities were sited, and UC's equation of proximity to a toxic facility with exposure to toxic releases. *See id.* at 135–36.

³⁴ See Kevin, *supra* note 31, at 137–45. Mr. Kevin states that considerations such as physical geography (geological stability, soil permeability, and absence of groundwater), expense in relation to other areas, proximity to similar facilities, proximity to transportation routes, and level of local opposition drive siting decisions. *See id.* at 138. He argues that "absent more concrete evidence of racial animus, disparate impacts or unequal results should be considered disproportionate only when other, non-racial factors do not explain siting." *Id.* at 138–39.

B. The Range of Legal Strategies Attempted in Permit Siting Cases

Environmental justice critics, activists, and scholars alike have offered a variety of theories to explain why the nation's minorities are disproportionately burdened with environmental pollutants and wastes.³⁵ The primary focus of the environmental justice movement has been on the disparate burdening of minority communities by the initial siting of industrial facilities.³⁶ To address perceived discriminative effects in siting, minority community groups and environmental justice organizations have employed a wide variety of legal strategies including federal and state environmental laws,³⁷ common law tort claims,³⁸ constitutional challenges,³⁹ and civil rights laws.⁴⁰ This section briefly explores those strategies, highlighting their strengths and limitations, and explains why some advocates have focused on Title VI as a powerful tool for environmental justice.

I. Causes of Action Under Environmental Statutes

Luke Cole, Staff Attorney for the California Rural Legal Assistance Foundation and General Counsel for the Center on Race, Pov-

³⁵ See, e.g., Fisher, *supra* note 2, at 291–96 (citing as hypotheses lack of political power in minority communities, market forces, and the tendency of minorities to seek jobs—and therefore homes—in communities with high levels of industrial use); Sheila Foster, *Justice From the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CAL. L. REV. 775, 787–811 (1998) [hereinafter Foster, *Justice*] (explaining that market dynamics, such as the attraction of minorities to areas of heavy industrial use and racial discrimination in sale and rental of housing, questions surrounding causation, and the role of siting processes have been theorized as explanations); Lazarus, *supra* note 7, at 806–24 (discussing the absence of minority political and economic power, the role of environmental policy making where environmental protections are disproportionately enjoyed by whites, the effects of deliberate exclusion and racial stereotyping, the possibility of minority disinterest in the environment, and the limited political and legal resources in minority communities); Light & Rand, *supra* note 7, at 8–14 (theorizing that patterns of economic development and the localization of health and environmental risks, the relative poverty and political powerlessness of minority communities, agency siting and zoning policies and administrative review processes, and the location of labor and capital resources may contribute to disproportionate racial burdens).

³⁶ See Cole, *supra* note 3, at 524. Mr. Cole notes that personal injury suits that assert injuries caused by toxic poisoning have been brought on behalf of plaintiffs against operative facilities. See *id.* at 524 n.5. Because these suits often last for years and many plaintiffs do not receive any compensation for their injuries, after-the-fact toxic tort suits have “disempowered and disillusioned many low-income communities and communities of color.” *Id.*

³⁷ See *id.* at 525–30; Fisher, *supra* note 2, at 301–09.

³⁸ See Fisher, *supra* note 2, at 309–10.

³⁹ See Cole, *supra* note 3, at 538–41; Fisher, *supra* note 2, at 303–06.

⁴⁰ See Cole, *supra* note 3, at 530–38; Fisher, *supra* note 2, at 311–15.

erty and the Environment, believes environmental laws present the best opportunity for groups to block a disfavored facility.⁴¹ His reasons are simple: judges are now comfortable with challenges made under environmental laws, and such laws are reasonably clear and are largely friendly to "credible challenges to improperly permitted facilities."⁴² These challenges focus on statutory interpretation and procedure, since many state and federal environmental laws emphasize compliance with the proper procedure for granting siting permits.⁴³ A successful plaintiff can win an order forcing the offending error in the permitting process to be mended before construction of the facility may proceed.⁴⁴ The resultant delay in facility creation or operation can allow the plaintiff time to build community pressure against the facility, and sometimes delay itself can be enough to deter siting of the facility.⁴⁵

There are significant drawbacks, however, to seeking environmental justice under federal and state environmental statutes.⁴⁶ First, because discharge of pollutants is permissible if done in compliance with a valid, properly issued permit, challenges to enforce discharge limits under such permits will not create a balanced distribution of environmental hazards where facilities are already concentrated in minority communities.⁴⁷ Second, some of the major environmental statutes, such as the National Environmental Policy Act (NEPA) and its state counterparts, are procedural in nature and do not have substantive standards regarding the siting and concomitant concentration of environmentally hazardous facilities.⁴⁸ As a result, a delay in the siting process or the documentation of potential impacts (e.g., another environmental assessment or environmental impact statement) may be the plaintiff's only victory, providing a "reprieve rather than a remedy."⁴⁹

⁴¹ See Cole, *supra* note 3, at 526.

⁴² See *id.*

⁴³ See *id.* at 527.

⁴⁴ See Fisher, *supra* note 2, at 308.

⁴⁵ See *id.*

⁴⁶ See *id.* at 307.

⁴⁷ See *id.*

⁴⁸ See *id.*

⁴⁹ See Fisher, *supra* note 2, at 308-09.

2. Common Law Tort Causes of Action

In addition to challenging siting permits under traditional environmental laws, plaintiff groups have successfully asserted their common law tort rights, such as public or private nuisance or personal injury, against industrial or hazardous waste facilities.⁵⁰ Such suits, however, may present significant barriers to minority communities as plaintiffs. First, because the plaintiff must prove intentional or unreasonable conduct by the defendant when bringing a public nuisance claim, liability may be hard to establish where the facility is operating in compliance with validly issued environmental permits.⁵¹ Second, because the plaintiff must have a property interest to bring a private nuisance action, many environmental justice plaintiffs may not have standing for this cause of action.⁵² Third, causation in personal injury claims may present a difficult hurdle for plaintiffs due to a lack of information concerning the health effects of toxins.⁵³ Lastly, because common law tort claims are typically geared towards the complaints of individual plaintiffs, with the exception of public nuisance, minority communities may find such suits frustrating and divisive.⁵⁴

3. Constitutional Causes of Action

In addition to applying environmental and tort law, environmental justice lawyers also have attempted to establish environmental inequity in the siting of facilities as a violation of the United States Constitution.⁵⁵ In 1994, Luke Cole commented: “[s]o far, almost every environmental justice civil rights case brought has alleged only a viola-

⁵⁰ See *id.* at 309–10.

⁵¹ See *id.* at 309.

⁵² See Interview with Denise Antolini, Assistant Professor, William S. Richardson Law School, University of Hawai‘i, in Honolulu, Haw. (Apr. 19, 1999). Antolini added, “[c]ommunity groups may also face barriers to bringing public nuisance claims because of the courts’ strict application of the traditional ‘special injury’ rule, which requires that a private plaintiff in a public nuisance lawsuit have an injury that is ‘special’ (i.e., distinct) from the rest of the affected community.” *Id.*

⁵³ See Fisher, *supra* note 2, at 309. Similarly, when a personal injury claim is brought, injunctive or other equitable relief, which is usually desired in environmental justice suits, may not be available as the traditional remedy under common law tort claims is damages. See *id.* at 310.

⁵⁴ See *id.*

⁵⁵ See *id.* at 303. See generally Alice Kaswan, *Environmental Laws: Grist for the Equal Protection Mill*, 70 U. COLO. L. REV. 387 (1999) (arguing that in some cases environmental laws can reveal discrimination necessary to prove a violation under the Equal Protection Clause).

tion of the [E]qual [P]rotection [C]lause of the Constitution.”⁵⁶ In the four published decisions that addressed equal protection challenges to local government siting decisions, all four courts held that the minority plaintiffs failed to prove an intent to discriminate,⁵⁷ even where disparities in environmental impacts were clearly connected to race.⁵⁸ This poor success rate can be attributed to the high threshold for proving intentional discrimination in equal protection challenges; the plaintiff must prove that the government *purposefully meant to discriminate* against minorities in the siting process.⁵⁹ This is a very difficult standard to meet because it ultimately requires the plaintiff to prove that the discriminatory decision was made because of its adverse effects on the minority community, not in spite of those effects.⁶⁰ Although discriminatory intent may be established circumstantially, the bar set by courts for such evidence is quite high⁶¹ and has

⁵⁶ Cole, *supra* note 3, at 538.

⁵⁷ See Kaswan, *supra* note 55, at 432 (citing *Terry Properties, Inc. v. Standard Oil Co.*, 799 F.2d 1523 (11th Cir. 1986); *R.I.S.E., Inc. v. Kay*, 768 F. Supp. 1144 (E.D. Va. 1991), *aff'd mem.*, 977 F.2d 573 (4th Cir. 1992); *East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Comm'n*, 706 F. Supp. 880 (M.D. Ga. 1989), *aff'd*, 896 F.2d 1264 (11th Cir. 1989); *Bean v. Southwestern Waste Management Corp.*, 482 F. Supp. 673 (S.D. Tex. 1979), *aff'd mem.*, 782 F.2d 1038 (5th Cir. 1986)).

⁵⁸ See Fisher, *supra* note 2, at 304–05.

⁵⁹ See Cole, *supra* note 3, at 539; Fisher, *supra* note 2, at 303–04. The controlling law in equal protection cases where the statute in question does not specifically address race (facial neutrality) is articulated in *Village of Arlington Heights v. Metropolitan Housing Developmental Corp.*, 429 U.S. 252 (1977) and *Washington v. Davis*, 426 U.S. 229 (1976). Under *Arlington Heights* and *Davis*, a showing of a discriminatory effect or impact alone is insufficient to prevail; a plaintiff must prove that the defendant acted with an intent to discriminate. See *Arlington Heights*, 429 U.S. at 264–66; *Davis*, 426 U.S. at 238–39; see also Cole, *supra* note 3, at 539; Fisher, *supra* note 2, at 303–04.

⁶⁰ See *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (elaborating on the intent requirement of *Arlington* and *Heights Davis*, the Court stated, “[d]iscriminatory purpose’ . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effect on an identifiable group.” (citation omitted)).

⁶¹ See *Arlington Heights*, 429 U.S. at 266–68. The Court suggested that intentional discrimination could be proven circumstantially using the “historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes.” *Id.* at 267. Also, any departures from the normal procedural “sequence of events leading up to the challenged decision . . . may shed some light on the decisionmaker’s purposes” and “might afford evidence that improper purposes are playing a role.” *Id.* Substantive departures may also indicate a discriminatory intent, such as where “factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.” *Id.* Lastly, the Court indicated that the administrative history regarding the decision “may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.” *Id.* at 268. However, even if the

yet to be met in any environmental justice challenges.⁶² Because of the poor success rate of such claims, Luke Cole has suggested that they be brought mainly for “political value” in conjunction with another type of challenge that has a greater success rate.⁶³ The power of alleging that a government-funded entity is practicing racism by depriving minorities of the core constitutional right of equal protection may have unique force in raising community awareness and outrage for environmental justice advocates.

4. Other Civil Rights Causes of Action

The same parallels between traditional civil rights challenges and environmental justice challenges that make equal protection claims appealing for plaintiffs also make other civil rights causes of action compelling.⁶⁴ Most intriguingly, plaintiffs proceeding under the statutory provisions of various civil rights acts may be relieved of the heavy burden of proving intent to discriminate.⁶⁵ In the past decade, environmental justice groups, EPA, scholars, and local permitting authorities have focused intense attention on one such civil rights statute: Title VI of the Civil Rights Act of 1964.⁶⁶

plaintiff is able to locate a circumstantial “smoking gun,” the burden is still on the plaintiff to prove that the defendant acted because the action would cause an adverse effect on the minority group in question, not in spite of that effect. *See Feeney*, 442 U.S. at 279.

⁶² *See Fisher*, *supra* note 2, at 304.

⁶³ Cole, *supra* note 3, at 541. *But see Kaswan*, *supra* note 55, at 407–56 (asserting that outcomes for equal protection claims are highly fact specific and that the *Arlington Heights* standard leaves open the possibility of circumstantially proving the presence of discriminatory intent).

⁶⁴ *See Cole*, *supra* note 3, at 530–31.

⁶⁵ *See infra* note 66 (discussing Title VIII of the Civil Rights Act of 1968).

⁶⁶ 42 U.S.C. § 2000d (1964). *See Lazarus*, *supra* note 7, at 834–39; *see generally* Cole, *supra* note 3 (placing Title VI type claims third on a four tier hierarchy of litigation strategies for environmental justice attorneys); Fisher, *supra* note 2 (arguing that Title VI is an effective tool for achieving environmental justice); Light & Rand, *supra* note 7 (stating that Title VI litigation is limited by the political nature of environmental racism); Bradford C. Mank, *Is There a Private Cause of Action Under EPA's Title VI Regulations?: The Need to Empower Environmental Justice Plaintiffs*, 24 COLUM. J. ENVTL. L. 1 (1999) [hereinafter Mank, *Private Cause of Action*] (arguing that courts should recognize a private right of action based on the EPA implementing regulations promulgated under Section 602 of Title VI); James H. Colopy, Note, *The Road Less Traveled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964*, 13 STAN. ENVTL. L.J. 125 (1994) (exploring the use of Title VI as a private cause of action and the nondiscrimination implementing regulations of EPA in an environmental justice context).

In addition to Title VI, environmental justice advocates have also explored the utility of bringing siting challenges under Title VIII of the Civil Rights Act of 1968. 42 U.S.C. §§ 3601–3619, 3631 (1988). *See generally* Alice L. Brown & Kevin Lyskowski, *Environmental*

Title VI began to emerge as a possible tool for environmental justice challenges in the early to mid-1990s.⁶⁷ At that time, leading environmental justice commentators such as Luke Cole and Washington University Law Professor Richard J. Lazarus observed that Title VI had "promise"⁶⁸ and a "potentially great" reach.⁶⁹ However, it was only within the past two years that several judicial and administrative decisions interpreted Title VI specifically as it applies to discriminatory siting decisions. These developments may threaten the efficacy of Title VI in environmental justice suits because they could be interpreted

Justice and Title VIII of the Civil Rights Act of 1968 (The Fair Housing Act), 14 VA. ENVTL. L.J. 741 (1995) (exploring the usefulness of Title VIII for environmental justice plaintiffs). Title VIII prohibits discrimination "against any person in the . . . sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status or national origin." 42 U.S.C. § 3604(b) (1988). See Cole, *supra* note 3, at 534; Lazarus, *supra* note 7, at 839. Title VIII has an advantage over equal protection claims in that the statute does not require a showing of intentional racial discrimination; therefore, an unjustified discriminatory impact may constitute a violation. See Brown & Lyskowski, *supra*, at 744; Cole, *supra* note 3, at 534-35; Lazarus, *supra* note 7, at 840. Also, unlike constitutional challenges, the prohibitions of Title VIII reach not just governmental, but purely private conduct as well. See Brown & Lyskowski, *supra*, at 744; Cole, *supra* note 3, at 534-35; Lazarus, *supra* note 7, at 839-40. Thus plaintiffs could challenge not only state permitting decisions, but also local government zoning decisions and actions by facility owners themselves. See Brown & Lyskowski, *supra*, at 744; Cole, *supra* note 3, at 535; Lazarus, *supra* note 7, at 840.

However, "the ultimate [and perhaps limited] usefulness of Title VIII['s] nondiscrimination mandate in redressing environmental inequity largely turns . . . on the meaning of 'provision of services and facilities . . .'" Lazarus, *supra* note 7, at 840. Courts have interpreted this language narrowly, limiting the provision of services and facilities contemplated under the statute to those with a connection to the "sale and rental of a dwelling." See *Laramore v. Illinois Sports Facilities Auth.*, 722 F. Supp. 443, 452 (N.D. Ill. 1989) (refusing to apply Title VIII to the siting of a stadium that would affect a black community through forced relocation because the permitting of the facility was not in connection with a sale or rental of a dwelling); see also Brown & Lyskowski, *supra*, at 751-55; Cole, *supra* note 3, at 536; Lazarus, *supra* note 7, at 840 n.242. As a result, although groups such as the United States Civil Rights Commission have argued that services such as sewage treatment are directly tied to "development and maintenance of urban areas," courts have rejected these arguments. See Lazarus, *supra* note 7, at 841 (quoting 6 U.S. COMMISSION OF CIVIL RIGHTS, *THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT*, 1974, at 598-99 (1975)). Commentators suggest that Title VIII may be most effective when combined with other legal strategies such as other civil rights statutes, environmental laws and regulations, and land use and zoning laws and ordinances. See Brown & Lyskowski, *supra*, at 755-56.

⁶⁷ See Lazarus, *supra* note 7, at 834. At the time of Mr. Lazarus's article, published in 1993, he wrote, "[o]ne option not yet well explored by civil rights plaintiffs in the environmental context is Title VI of the Civil Rights Act of 1964." *Id.* A year later, Mr. Cole noted, "[s]trategies for employing Title VI in environmental justice and other cases have been well discussed in legal literature, and the approach has been used in a series of cases." Cole, *supra* note 3, at 532.

⁶⁸ Cole, *supra* note 3, at 534.

⁶⁹ Lazarus, *supra* note 7, at 835.

to limit significantly the meaning of "disparate impact" and the very legitimacy of a private cause of action for such claims. The remainder of this article focuses upon those decisions and assesses Title VI's potential as a tool for environmental justice.

II. APPLICATION OF TITLE VI IN ENVIRONMENTAL JUSTICE SITING CASES

A. *Title VI, Sections 601 and 602: Discriminatory Intent Versus Discriminatory Effect*

To understand the potential effects of recent Title VI decisions, it is first necessary to understand the framework of Title VI in its regulatory and judicial capacities, both as written and as applied. Title VI provides two vehicles under which minorities may seek remedy for discrimination in federally funded programs and activities: Section 601 and Section 602. Section 601 of Title VI⁷⁰ provides: "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."⁷¹ The potential scope of Title VI is broad: even if an allegedly discriminatory program is not specifically designated for federal funding, the clause "program or activity" embraces all activities of a state or local agency that receive federal monies.⁷² Because virtually all state environmental permitting agencies receive federal funding for their regulatory and environmental protection functions,⁷³ all actions, including permitting decisions, taken by state agencies funded by EPA are amenable to suit under Title VI.⁷⁴

⁷⁰ Pub. L. No. 100-259, 102 Stat. 28 (1988).

⁷¹ 42 U.S.C. § 2000d (1999).

⁷² See Keith N. Cole & Carita T. Shanklin, *Environmental Permits as Civil Rights Violations: Three Recent Developments in a Rapidly Emerging Area of Law*, METRO. CORP. COUNS. 9, July, 1998, at Col. 1.

⁷³ According to the United States Department of Justice, in 1996 EPA provided about \$4.3 billion in federal financial assistance under 44 EPA programs to approximately 1,500 recipients. See U.S. Amicus Curiae Brief at 5, *Chester Residents Concerned for Quality of Living v. Seif*, 132 F.3d 925 (3d Cir. 1997) (No. 97-1125) (citing U.S. COMM'N ON CIVIL RIGHTS, FEDERAL TITLE VI ENFORCEMENT TO ENSURE NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS 415 (1996)).

⁷⁴ See Fisher, *supra* note 2, at 312; Mank, *Private Cause of Action*, *supra* note 66, at 16; David Sive & Lemuel M. Srolovic, *Environmental Justice Issues Develop Facility Permits and Civil Rights*, N.Y. L.J., Oct. 26, 1998, at Col. 1.

Similar to equal protection lawsuits, however, environmental justice cases challenging permitting decisions under Section 601 of Title VI must demonstrate intentional discrimination to make a *prima facie* case.⁷⁵ As in the equal protection context, it is difficult for plaintiffs to prove improper intent solely on the basis of racial disparities in environmental impact.⁷⁶ Therefore, direct challenges to state permitting decisions under Title VI, Section 601, are not likely to be an effective legal weapon for environmental justice advocates.⁷⁷

Title VI, however, provides a second vehicle for environmental justice advocates challenging state facility siting decisions: Section 602.⁷⁸ Section 602 mandates agencies that distribute federal funds, such as EPA, to promulgate regulations that implement Section 601, and requires agencies to create a framework for processing complaints of racial discrimination.⁷⁹ EPA's implementing regulations, adopted in 1973 and amended to their current form in 1984,⁸⁰ pro-

⁷⁵ See Cole & Shanklin, *supra* note 72; Light & Rand, *supra* note 7, at 24.

⁷⁶ See *supra* text accompanying notes 55–63.

⁷⁷ See *id.* See, e.g., *Chester Residents Concerned for Quality Living v. Seif*, 944 F. Supp. 413 (E.D. Pa. 1996).

⁷⁸ 42 U.S.C. § 2000d-1 (1999). See Cole & Shanklin, *supra* note 72.

⁷⁹ Section 602 of Title VI provides in relevant part:

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract . . . is authorized and directed to effectuate the provisions of section 2000d [Section 601] of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record . . . of a failure to comply with such requirement

42 U.S.C. § 2000d-1. Section 602 additionally specifies procedural safeguards regarding the termination of funding. See *id.* See Cole & Shanklin, *supra* note 72, at Col. 1; Mank, *Private Cause of Action*, *supra* note 66, at 12.

⁸⁰ See U.S. Amicus Curiae Brief at 5, *Chester* (No. 97–1125). The original EPA regulations specified that a fund recipient could not, “directly or indirectly, utilize certain criteria or methods of administration which have or may have the effect of subjecting a person to discrimination because of race, color, or national origin.” 38 Fed. Reg. 17,969 (1973). According to the U.S. Amicus Brief, the 1984 amendments to EPA’s discriminatory effect regulations were not intended to “change the content of earlier EPA regulations,” but rather to express the nondiscrimination provisions ‘in simple language that preserves their original intent.’ See U.S. Amicus Curiae Brief at 5–6, *Chester* (No. 97–1125) (citing *Non-Discrimination on the Basis of Race, Color, National Origin, Age, Handicap and Sex in Federally Assisted Programs*, 46 Fed. Reg. 2306 (1981)).

scribe recipients of EPA funds from using "criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex" ⁸¹ The language of the regulation contemplates a purely *discriminatory effect* standard. ⁸² Thus, a plaintiff challenging a siting decision under Section 602 is relieved of the formidable task of proving that the permit in question was issued with the intent to discriminate; a showing of discriminatory effect or disparate impact on the basis of race suffices. ⁸³ Section 602 holds more promise for environmental justice advocates than Section 601 and will be examined in greater detail.

B. Section 602 and EPA's Disparate Impact Enforcement

Despite promulgating regulations under Section 602 in 1973, EPA avoided enforcement of Title VI until 1993. ⁸⁴ Commentators have observed that the agency regarded its central purpose as regulating pollution, and it did not want to weaken this role by revoking funding from state and local environmental authorities, or by delaying its own pollution control efforts in favor of policies not directly focused on that aim. ⁸⁵ EPA reasoned that even if it revoked funding to recipients for discrimination, state and local authorities might continue their objectionable practices, and pollution control could suffer from the lack of funds—ultimately minorities might be adversely affected rather than assisted by the funding sanction. ⁸⁶

⁸¹ Protection of Environment, 40 C.F.R. § 7.35(b) (1984) (emphasis added).

⁸² See generally Cole & Shanklin, *supra* note 72, at Col. 1; Sive & Srolovic, *supra* note 74, at Col. 1. This reading of the standard imposed by EPA implementing regulations is confirmed in the agency's Interim Guidance document, which is discussed in detail in section II.B.1 of this paper. Additionally, after Congress enacted Title VI, Section 602 in 1964, the government has interpreted that section as contemplating a discriminatory effect standard. See Mank, *Private Cause of Action*, *supra* note 66, at 13–14 (citing *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 618 (1983) (Marshall, J.) (recipients may not use "criteria or methods of administration which have the effect of subjecting individuals to discrimination." (quoting 45 C.F.R. § 80.3(b)(2) (1964))).

⁸³ See Lazarus, *supra* note 7, at 834–35; Light & Rand, *supra* note 7, at 25.

⁸⁴ See Colopy, *supra* note 66, at 180–88 (detailing the history of EPA non-enforcement); Lazarus, *supra* note 7, at 836–38 (outlining EPA's policy of avoiding civil rights issues); Mank, *Private Cause of Action*, *supra* note 66, at 17–18 (explaining EPA's early failure regarding the enforcement of Title VI).

⁸⁵ See Colopy, *supra* note 66, at 181–82; Fisher, *supra* note 2, at 313–14; Lazarus, *supra* note 7, at 836–38; Mank, *Private Cause of Action*, *supra* note 66, at 17–18.

⁸⁶ See Colopy, *supra* note 66, at 181–82; Fisher, *supra* note 2, at 313–14; Lazarus, *supra* note 7, at 836–38; Mank, *Private Cause of Action*, *supra* note 66, at 17–18.

However, this pattern of EPA non-enforcement began to change in 1993 when the newly elected Clinton Administration began to pressure the agency about its obligation to meet Title VI's nondiscrimination mandates.⁸⁷ In response to the growing interest in environmental justice and siting disparities, on February 11, 1994, President William J. Clinton issued Executive Order 12,898.⁸⁸ In broad terms, the order instructs all federal agencies to conduct their programs and policies in a manner that achieves environmental justice and promotes non-discrimination against minorities and those with low incomes.⁸⁹ Although the President's order appears clear and was supported by EPA Administrator Carol Browner and Attorney General Janet Reno,⁹⁰ significant uncertainty remains today regarding the mechanism, if any, for enforcing the order.⁹¹ The order itself states that it does *not* create a private right of action under Title VI, nor does it provide for any type of judicial review of regulatory decisions.⁹² While the order officially secured Title VI a spotlight in the environmental justice debate, it did little to clarify how the remedy would be applied "on the ground."

EPA responded to the Clinton Administration's pressure by creating an Office of Civil Rights (OCR) to address its Title VI responsibilities,⁹³ yet the agency continued to receive criticism for processing complaints slowly and conducting secretive investigations.⁹⁴ Of the

⁸⁷ See Mank, *Private Cause of Action*, *supra* note 66, at 18.

⁸⁸ See Exec. Order No. 12,898, 3 C.F.R. 859 (1995), *reprinted in*, 42 U.S.C § 4321 (1994); see also Bowers, *supra* note 10, at 649; Sive & Srolovic, *supra* note 74, at Col. 1.

⁸⁹ See Bowers, *supra* note 10, at 649-50; Sive & Srolovic, *supra* note 74, at Col. 1.

⁹⁰ See Bowers, *supra* note 10, at 650. Administrator Browner and Attorney General Reno issued a press conference on the day that President Clinton signed Executive Order 12,898, stating the importance of community involvement in siting decisions. See *id.* (citing The White House Office of Communication, Briefing by EPA Administrator Browner and Attorney General Reno on Environmental Justice 3 (Feb. 11, 1994)).

⁹¹ See Sive & Srolovic, *supra* note 74, at Col. 1.

⁹² See Exec. Order 12,898, *supra* note 88, § 6-609. The order reads:

This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, or any other person with this order.

Id.; see also Sive & Srolovic, *supra* note 74, at Col. 1.

⁹³ See Mank, *Private Cause of Action*, *supra* note 66, at 18.

⁹⁴ See *id.*; David Mastio, *EPA Keeps Key Documents Secret: They Contradict New Agency Policy on Environmental Justice*, DETROIT NEWS, July 17, 1998, at A1 [hereinafter Mastio, *Secret*].

fifty-eight environmental justice complaints lodged with the agency between September, 1993 and August, 1998,⁹⁵ EPA came to no conclusion on at least fifteen,⁹⁶ and found none to be in violation of Title VI.⁹⁷ Responding to the President's executive order and to the confusion surrounding its own largely ignored regulations, EPA issued its *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits* in February, 1998.⁹⁸ A month later, the agency created an advisory committee to assist in achieving Title VI compliance.⁹⁹ The Interim Guidance was drafted to "provide a framework for the processing by EPA's Office of Civil Rights (OCR) of complaints filed under Title VI . . . alleging discriminatory effects" specifically attending to "complaints that allege discrimination in the environmental permitting context."¹⁰⁰

1. EPA's Interim Guidance: A Blueprint for Processing Complaints

The Interim Guidance had the potential to be pivotal in the environmental justice movement because it sought to establish a multi-step blueprint for addressing permitting complaints,¹⁰¹ and therefore would answer many of the uncertainties surrounding EPA's Title VI policies. First, under the Interim Guidance, complaints brought to EPA alleging violations of Title VI must be written, signed, and lodged within 180 days of the occurrence of the "alleged discriminatory acts."¹⁰² An act under the Interim Guidance may include issuance of a new permit or permit modification that results in a "net increase of pollution impacts," or an existing permit's renewal.¹⁰³

⁹⁵ See Mank, *Private Cause of Action*, *supra* note 66, at 18 (citing Prepared Testimony of Ann Goode, Director of Civil Rights, U.S. EPA, Before the Oversight and Investigations Subcommittee of the House of Representatives Commerce Committee, Federal News Service, Aug. 6, 1998, 1998 WL 12763096).

⁹⁶ See *id.* at 18-19; David Mastio, *Murky Rules Stall EPA Race Policy: After 5 Years, \$50 Million, Agency Hasn't Solved One Claim of Civil Rights Violations*, DETROIT NEWS, Oct. 20, 1998, at A1 [hereinafter Mastio, *Murky*].

⁹⁷ See Mank, *Private Cause of Action*, *supra* note 66, at 18; Mastio, *Murky*, *supra* note 96, at A1).

⁹⁸ EPA, *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (Feb. 5 1998) [hereinafter Interim Guidance].

⁹⁹ See Mank, *Private Cause of Action*, *supra* note 66, at 19 (citing *New EPA Advisory Committee to Address Rights Concern of State, Local Permitting*, 28 ENV'T REP. (BNA) 2441 (Mar. 20, 1998)).

¹⁰⁰ Interim Guidance, *supra* note 98, at 2.

¹⁰¹ See *id.* at 4-6

¹⁰² *Id.* at 7.

¹⁰³ *Id.* at 8-9.

Once a complaint is accepted for review, EPA will undertake a five-step analysis to determine whether a disparate impact has been created.¹⁰⁴ Initially, EPA must "identify the population affected by the permit that triggered the complaint," generally determined by proximity to the facility.¹⁰⁵ Once the population that "suffers the adverse impacts" is determined, the racial and/or ethnic composition of that population must be established.¹⁰⁶ To establish whether a "cumulative burden or patterns of disparate impact exists,"¹⁰⁷ EPA must next determine what other permitted facilities should be included in the analysis and the racial compositions of the populations affected by those permits.¹⁰⁸ Based upon all of this information, EPA conducts a disparate impact analysis that compares the racial characteristics of the allegedly suffering population with that of the non-affected population to determine whether "persons protected under Title VI are being impacted at a disparate rate."¹⁰⁹ Finally, EPA evaluates the significance of the disparity, which, if statistically significant, results in EPA making a *prima facie* finding of disparate impact.¹¹⁰

If EPA makes a *prima facie* determination of discrimination under the guidance, the state permitting agency is afforded an opportunity to rebut the finding or to submit a proposal to mitigate the unequal effects.¹¹¹ Even where rebuttal of the complainant's *prima facie* case or mitigation efforts fail, a party has one last opportunity to avoid loss of funding by "justifying" the issuance of the permit despite the

¹⁰⁴ See *id.* at 9.

¹⁰⁵ Interim Guidance, *supra* note 98, at 9.

¹⁰⁶ *Id.* at 9-10.

¹⁰⁷ Cole & Shanklin, *supra* note 72, at Col. 1.

¹⁰⁸ See Interim Guidance, *supra* note 98, at 10.

¹⁰⁹ *Id.* at 11.

¹¹⁰ See *id.*

¹¹¹ See *id.* at 11-12. Specifically as to mitigation, the Interim Guidance states that "[w]hen it is not possible or practicable to mitigate sufficiently the public health or environmental impacts of a challenged permit, EPA will consider 'supplemental mitigation projects' (SMPs), which, when taken together with other mitigation efforts, may be viewed by EPA as sufficient to address the disparate impact." *Id.* at 11. This approach appears to provide some flexibility to mitigation as an SMP can address complainant concerns about permitting that "cannot otherwise be redressed under Title VI (i.e., because they are outside those consideration ordinarily entertained by the permitting authority)." *Id.* at 12. Mitigation could thus involve stricter permit controls or activities and projects with no direct tie to the environmental impacts of the facility. See Cole & Shanklin, *supra* note 72, at Col. 1. The EPA views mitigation as an "important focus" in this process, because mitigation efforts, as a less drastic alternative to the existing permitting process, may allow the fund recipient to avoid the "draconian outcomes" of total loss of EPA financial assistance. See Interim Guidance, *supra* note 98, at 11.

proven disparate effects.¹¹² To do so, the permitting authority must demonstrate a "substantial, legitimate interest . . . some articulable value to the recipient in the permitted activity."¹¹³ These interests may include broader governmental interests, such as: (1) whether the disparate impact is weighty; (2) whether the permit in question is a renewal that provides demonstrated benefits; or (3) whether a newly issued permit is likely to benefit the surrounding community.¹¹⁴ However, EPA will not consider justification where a less discriminatory alternative to the current process of permitting exists.¹¹⁵

Throughout this process, EPA encourages the use of informal resolution where possible, but ultimate failure to comply may lead to denial, suspension, or termination of funding by EPA.¹¹⁶ However, even if EPA's investigation reveals a violation of Title VI, a fund recipient has many remaining procedural rights. According to EPA's implementing regulations, if EPA concludes that a funding recipient is in violation of Title VI, the recipient may, within thirty days, request a hearing before an administrative law judge (ALJ).¹¹⁷ Following the ALJ's findings, the recipient is entitled to appeal the decision to an EPA Administrator.¹¹⁸ While the Administrator has the power to refuse, postpone, or discontinue EPA funding to the particular offending program or "part thereof," the Administrator must first make a full report regarding the decision to all congressional committees with legislative authority over the program and allow Congress thirty days to respond.¹¹⁹ Further, should EPA decide to terminate funding, the recipient may ask for a judicial review of the agency's decision.¹²⁰

Conversely, if EPA's Office of Civil Rights finds insufficient evidence to indicate that the fund recipient violated Title VI, the agency simply will report this finding to both the complainant and recipient,

¹¹² See *id.* at 12; see also Cole & Shanklin, *supra* note 72, at Col. 1.

¹¹³ See Interim Guidance, *supra* note 98, at 12.

¹¹⁴ See *id.*

¹¹⁵ See Cole & Shanklin, *supra* note 72, at Col. 1.

¹¹⁶ See Rachel L. Schowalter, *The U.S. Environmental Protection Agency: Fiscal Year 1998 in Review*, 28 ENVTL. L. REP. 10,721, 10,727 (1998).

¹¹⁷ See Protection of Environment, 40 C.F.R. § 7.130(b)(1)–(3) (1999); see also Mank, *Private Cause of Action*, *supra* note 66, at 21.

¹¹⁸ See 40 C.F.R. § 7.130(b)(3)(i); see also Mank, *Private Cause of Action*, *supra* note 66, at 21.

¹¹⁹ See 40 C.F.R. § 7.130(b)(3)(iii); see also Mank, *Private Cause of Action*, *supra* note 66, at 21.

¹²⁰ See 42 U.S.C. § 2000d-2 (1999); see also Mank, *Private Cause of Action*, *supra* note 66, at 21.

and dismiss the complaint.¹²¹ There is no mechanism for a frustrated complainant to appeal under either the Interim Guidance or EPA regulations. Additionally, commentators have agreed that plaintiffs cannot sue EPA under the Administrative Procedure Act (APA) to challenge the agency's determination following an investigation into a party's Title VI compliance.¹²²

The Interim Guidance concludes by stating that it is "intended solely as a guidance" and does not create any enforceable rights in respect to litigation.¹²³ Thus, according to EPA, the Interim Guidance, like the President's executive order, does not create a private cause of action for claims of discriminatory siting; it creates only an administrative procedure.¹²⁴ Following the issuance of the Interim Guidance, EPA opened a comment period during which the agency accepted reactions from all sectors.¹²⁵

Generally, the overall response to the Interim Guidance was negative. During the comment period, industrial corporations represented the largest group to file statements with EPA regarding the Interim Guidance, comprising thirty-two percent of all comments submitted.¹²⁶ The corporate commentators who challenged and criticized the Interim Guidance were joined in their opposition by a large num-

¹²¹ See 40 C.F.R. § 7.120(g); Mank, *Private Cause of Action*, *supra* note 66, at 22.

¹²² 5 U.S.C. §§ 701-706 (1988). See Colopy, *supra* note 66, at 169-70; Fisher, *supra* note 2, at 317 n.158; Mank, *Private Cause of Action*, *supra* note 66, at 22. The APA allows individuals to sue a federal agency for failure to enforce its regulations, but only in the event that there is no other adequate remedy and when the agency's determination is not already committed to agency discretion. See Colopy, *supra* note 66, at 169. Because the complainant has an adequate remedy, opportunity to bring suit against the fund recipient under Title VI, Section 601 and arguably Section 602, courts generally do not allow a private cause of action under the APA against the federal funding agency to review its enforcement of Title VI. See *id.* at 170. Additionally, the Supreme Court has further curtailed a frustrated complainant's opportunity to bring suit by holding that an agency's determination to take no action towards enforcement, "should be presumed immune from judicial review under § 701(a)(2)." *Heckler v. Chaney*, 470 U.S. 821, 832 (1985); see also Colopy, *supra* note 66, at 169-70.

The APA, however, may still be useful to complainants. Although litigants under the APA cannot challenge EPA's decision regarding a funding recipient's compliance with Title VI, one commentator has indicated that plaintiffs could challenge any refusal to take action by EPA if that agency actually determined that the funding recipient was in violation of regulations. See *id.* at 170.

¹²³ Interim Guidance, *supra* note 98, at 12.

¹²⁴ See *supra* text accompanying note 92.

¹²⁵ See Cole & Shanklin, *supra* note 72, at Col. 1.

¹²⁶ See *The Corporate Backlash Against Environmental Justice* (visited Feb. 26, 1999) <<http://www.corpwatch.org/trac/gallery/ej/>>. Corporate Watch identifies itself as an "online magazine and resource center designed to provide . . . an array of tools that you can use to investigate and analyze corporate activity." *Id.*

ber of other private business and governmental organizations.¹²⁷ The complaints from government officials and leaders of business communities focused on the projected negative impacts to job growth in minority communities and the lack of input from state and local governments in forming the policy.¹²⁸

Business concerns and state permitting authorities expressed a basic concern with the post hoc nature of the Title VI regulatory scheme because the disparate impact analysis takes place in isolation from the state permitting process and after the state permit has been issued.¹²⁹ This raises serious concerns for business, where finality and predictability are key to operating a profitable venture.¹³⁰ Regarding problems of predictability and planning under the guidance, corporate and government commentators have specifically expressed concern as to: (1) when challenges may be filed in the permitting or facil-

¹²⁷ These business and government challengers included: the Environmental Commissioners of the States, the National Association of Attorneys General, the Western Governor's Association, the Environmental Council of the States, the National Association of Black County Officials, the U.S. Chamber of Commerce, the National Association of Counties, and the U.S. Conference of Mayors. See Cole & Shanklin, *supra* note 72, at Col. 1; Jeffrey B. Gracer, *Taking Environmental Justice Claims Seriously*, 28 ENVTL. L. REP. 10,373, 10,374 (1998); David Mastio, *Another Setback for EPA Policy*, THE DETROIT NEWS, July 2, 1998 <<http://www.detroitnews.com/998/biz/9807/02/07020019.htm>> [hereinafter Mastio, *Setback*].

¹²⁸ See Mastio, *Setback*, *supra* note 127. Government and business leaders indicated specific concerns for conflict with economic empowerment zones, brownfields initiatives, and other attempts to revitalize business in minority and disadvantaged communities. See Sive & Srolovic, *supra* note 74, at Col. 1. The pro-business Washington Legal Foundation has even challenged the very authority of EPA to promulgate such regulations in regard to findings of disparate impact in an amicus curiae brief filed in the *Chester* case. See Joan McKinney, Pa. *Case Similar to Shintech Saga*, BATON ROUGE ADVOCATE, June 28, 1998, at 17B. The Washington Legal Foundation's argument fundamentally asserts:

In the section of the Civil Rights Act that deals with federal funding cutoffs, Congress reserved this punitive action for deliberate and intentional acts of discrimination; but EPA's environmental justice regulations will allow a funding cutoff if there is a discriminatory effect, even if discrimination was not done on purpose.

Id.

¹²⁹ See Gracer, *supra* note 127, at 10,375. In the words of one commentator, "[e]ven after the traditional permitting process has been successfully completed, another unit of the EPA could demand additional changes or withdrawal of the permit based on environmental justice concerns." *Id.*

¹³⁰ See *id.*

ity operating process;¹³¹ (2) perceived vagaries in EPA's "disparate impact" analysis;¹³² (3) whether the funding recipient carries the burden of proof;¹³³ and (4) uncertainty surrounding EPA's "mitigation" policy.¹³⁴

¹³¹ See *id.* The Interim Guidance allows both permit modifications and renewals to trigger disparate impact claims; therefore, facilities that have been operating in communities for years could suddenly be confronted with environmental justice charges. See *id.*; see also Interim Guidance, *supra* note 98, at 7. This appears to be true even where the facility pre-dated additional pollution sources, or even the presence of a predominantly minority community.

¹³² See Gracer, *supra* note 127, at 10,375. Although the Interim Guidance provides a five-step analysis to determine whether a disparate impact exists, the guidance does not detail issues that are "at the heart of the disparate impact analysis," such as the "proper unit of measure for disparate impact analysis and statistical significance." *Id.*; see *supra* text accompanying notes 98, 116, 123-25. In particular, the guidance does not clarify exactly how EPA will define "affected and unaffected populations," nor does it specify what statistical methodology is to be used. See Gracer, *supra* note 127, at 10,375. Because of this lack of detail in the disparate effect analysis and a lack of regulatory precedent in this area, discriminatory impact siting challenges will necessarily be decided on a case-by-case basis "against a backdrop of uncertainty." *Id.*

¹³³ See Gracer, *supra* note 127, at 10,375. Jeffrey B. Gracer, a practicing environmental attorney, has interpreted the guidance as improperly placing the "ultimate burden of proof" upon the permitting agency. See *id.* According to Mr. Gracer, this view contrasts the Title VI regulations under the Interim Guidance to other civil rights legislation such as Title VII or Title IX. See *id.* Under these latter statutes, after the complainant makes a *prima facie* case of discrimination, the burden shifts to the defendant either to rebut the *prima facie* case of disparate impact or to demonstrate justification by legitimate considerations. See *id.* (citing *Larry P. v. Riles*, 793 F.2d 969, 982 & n.9 (9th Cir. 1984)). The ultimate burden, however, then shifts back to the complainant to prove that the defendant's business necessity could be met through less discriminatory means. See *id.* (citing *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993)). In contrast, under the Interim Guidance, Mr. Gracer observes that "the state agency not only must establish that the permit is necessary to advance a 'substantial, legitimate interest,' but must also prove that there is no less discriminatory alternative." *Id.* (quoting Interim Guidance, *supra* note 98, at 5). See *supra* text accompanying notes 112-15. Additionally, Mr. Gracer contends that EPA regulation does not require suggested mitigation offers or less restrictive alternatives to honor a permitting authority's bona fide business necessities. See Gracer, *supra* note 127, at 10,375. These considerations are especially significant because victory in disparate effect cases frequently hinges upon which party carries the ultimate burden of proof. See *id.*

¹³⁴ See Gracer, *supra* note 127, at 10,375. Some critics have attacked the Interim Guidance because EPA characterizes alternatives and mitigation as an "important focus" in the process of approaching disparate effect claims, but the guidelines do not indicate how mitigation should be applied specifically to environmental justice concerns. See *id.*; *supra* note 111 and accompanying text; see also Interim Guidance, *supra* note 98, at 11. Because of the newness and originality of the guidelines, mitigation in an environmental justice sense is not well explored, and it is not known what measures might be appropriate in that regard. See Gracer, *supra* note 127, at 10,375. For example, could job training for minority

While state permitting agencies and business concerns have been quite vocal in their opposition to the Interim Guidance,¹³⁵ it is more difficult to discern the view of environmental justice advocates.¹³⁶ Sheila Foster, an Associate Professor of Law at Rutgers School of Law and an environmental justice scholar,¹³⁷ offered two criticisms of the guidance from the minority community perspective.¹³⁸ First, though business and governmental concerns criticize the Interim Guidance for having vague and unpredictable standards to identify disparate impact,¹³⁹ Professor Foster counters that this ambiguity can cut against community groups—a “finding of discriminatory impact is not a given.”¹⁴⁰ Specifically, she argues that the third step of the disparate impact analysis¹⁴¹ creates a kind of “scientific myopia.”¹⁴² According to Professor Foster, the environmental health of the community as a whole should be considered in the disparate impact analysis, not just the presence of other facilities.¹⁴³

Professor Foster also raises concerns regarding the opportunity provided in the guidance for fund recipients to justify a finding of disparate impact “based on the substantial, legitimate interests of the recipient.”¹⁴⁴ She characterizes this provision of the guidance as vague

community residents or benefit payments to the affected community be offered to offset environmental discriminatory effects? *See id.*

¹³⁵ *See supra* notes 126–34 and accompanying text; *see, e.g.*, National Governor’s Association, *Federal Interpretations of Environmental Justice Claims Threaten State Programs* (visited Feb. 26, 1999) <<http://www.nga.org/pubs/issueBriefs/1997/971028EnviroJustice.asp>>.

¹³⁶ Professor Sheila Foster suggests that minority community organizations interested in environmental justice may not currently have a solid view on the subject because a final guidance on the subject is still anticipated from EPA. Telephone interview with Sheila Foster, Associate Professor of Law, Rutgers School of Law (Feb. 26, 1999) [hereinafter Foster, Interview].

¹³⁷ *See generally* Foster, *Justice*, *supra* note 35.

¹³⁸ *See* Foster, Interview, *supra* note 136.

¹³⁹ *See supra* notes 128–34 and accompanying text.

¹⁴⁰ Foster, Interview, *supra* note 136. Professor Foster asserts that the standard constructed by EPA appears to be very difficult for complainants to meet as applied. *See id.*

¹⁴¹ *See id.* This section of the guidance requires that the investigation identify “which other permitted facilities, if any, are to be included in the analysis and to determine the racial or ethnic composition of the populations affected by those permits.” Interim Guidance, *supra* note 98, at 10.

¹⁴² Foster, Interview, *supra* note 136. *See infra* text accompanying notes 203–07.

¹⁴³ Foster, Interview, *supra* note 136. A thorough inquiry should consider the environmental health of the entire community, for example, the presence of toxins in residents’ homes (e.g., lead levels), or perhaps the relative health of the community, not just the presence of other industrial or waste facilities in the vicinity of the facility to be permitted. *Id.*

¹⁴⁴ *Id.* *See* Interim Guidance, *supra* note 98, at 12; *supra* text accompanying notes 107–08.

and, therefore, difficult to critique.¹⁴⁵ Her principal concern is that the guidance could be interpreted in a circular fashion based upon the undefined concept of "justification."¹⁴⁶ Despite the document's statement that compliance with "applicable environmental regulations will not *ordinarily* be considered a substantial, legitimate justification,"¹⁴⁷ such a rationale remains acceptable under the regulations, and it is not clear how much more justification a permitting authority needs to demonstrate.¹⁴⁸

In response to the criticisms of the Title VI regulatory procedure detailed in the Interim Guidance, Administrator Browner asked EPA's Title VI advisory committee and the agency's Science Advisory Board to review the guidance and to make recommendations.¹⁴⁹ In this capacity, the committee has held public meetings throughout the nation and it released its recommendations on March 1, 1999.¹⁵⁰ Currently, federal legislation prohibits EPA from using any "funds 'to implement or administer the interim guidance'" for complaints submitted after October 21, 1998.¹⁵¹ This legislation has no effect on the fifteen com-

¹⁴⁵ See Foster, Interview, *supra* note 136.

¹⁴⁶ *Id.*

¹⁴⁷ Interim Guidance, *supra* note 98, at 12 (emphasis added).

¹⁴⁸ See Foster, Interview, *supra* note 136; see *infra* notes 183-93 and accompanying text.

¹⁴⁹ See Mank, *Private Cause of Action*, *supra* note 66, at 19. EPA's Title VI advisory committee has representation from state and local governments, industry, and environmental justice advocates. Sive & Srolovic, *supra* note 74, at Col. 1.

¹⁵⁰ See Sive & Srolovic, *supra* note 74, at Col. 1; Mary Greczyn, *Environmental Racism Debate Grows*, WASTE NEWS, Dec. 21, 1998; NATIONAL ADVISORY COUNCIL FOR ENVIRONMENTAL POLICY AND TECHNOLOGY, NEXT STEPS FOR EPA, STATE, AND LOCAL ENVIRONMENTAL JUSTICE PROGRAMS (Mar. 1, 1999) (available at <<http://www.epa.gov/ocempage/nacept/titleVI/tidlrpt.html>>).

¹⁵¹ U.S. EPA, *The EPA Office of Civil Rights: Policies and Guidances* (visited Jan. 10, 2000) <<http://www.epa.gov/ocrpage1/polguid.htm>>. See also Mank, *Private Cause of Action*, *supra* note 66, at 20 (citing Appropriations Act for Departments of Veterans Affairs and Housing and Urban Development and Independent Agencies for Fiscal Year Ending September 30, 1999, Pub. L. No. 105-276 (H.R. 4194), 112 Stat. 2461, 105th Cong. Tit. III (1998)); Cindy Skrzycki, *The Regulators: With EPA as Judge-Up Against the Environmental Justice System*, WASHINGTON POST, Oct. 23, 1998, at F1; Bill Walsh, *Law Puts EPA Bias Rules on Hold: Industry Targets Racism Probes*, NEW ORLEANS TIME-PICAYUNE, Oct. 23, 1998, at A8. "During October of 1998, President Clinton signed an appropriations bill that included a rider sponsored by Republican members of Congress that places a moratorium on the EPA accepting new Title VI complaints until the agency issues a final guidance." Mank, *Private Cause of Action*, *supra* note 66, at 20.

Congress enacted this legislation notwithstanding EPA's assertion that it would continue to accept and evaluate complaints relative to permitting under its legal obligation to do so, despite challenges to its legal authority by environmental justice opponents. See Sive & Srolovic, *supra* note 74, at Col. 1; see also *supra* note 128 and accompanying text. Opponents to the Interim Guidance characterized the moratorium as a warning to EPA "to adopt a more flexible approach to efforts to site facilities in minority or low-income com-

plaints that were pending at the time of its passage, but 42 complaints are now pending, and EPA has yet to release its much anticipated final guidance for Title VI complaints.¹⁵²

2. The Interim Guidance as Applied: An Effective Tool?

To determine whether the Interim Guidance has clarified EPA's Title VI investigative procedure, one must assess its effectiveness in application. However, the ability to conduct this type of scrutiny regarding the guidance is severely limited. To date EPA has approximately forty-two environmental justice complaints pending (some since 1993),¹⁵³ but, despite the fact that commentators anticipated a decision regarding the Shintech polyvinyl chloride (PVC) plant in Louisiana,¹⁵⁴ EPA has issued only one final decision under the guidance, the *Select Steel* case.¹⁵⁵ The Shintech near miss and the *Select Steel* decision shed precious little light on how the policies of the Interim Guidance are applied in practice.

a. *The Shintech Saga*

The "Shintech Saga"¹⁵⁶ provides rare insight into the way that EPA may pursue statistical analysis, such as demographics, in disparate impact cases under its enforcement of Title VI, and reveals the more

munities." See Mank, *Private Cause of Action*, *supra* note 66, at 20. Environmental justice advocates countered by stating that the moratorium would, in fact, have little true effect due to EPA's lack of resources to investigate new complaints and decision to delay consideration of new complaints until the final guidance for Title VI was completed. See *id.*

¹⁵² See *id.*; U.S. EPA, *Status Summary Table of Title VI Administrative Complaints* (Oct. 1, 1999) (available at <<http://www.epa.gov/ocrp/ocrpage1/docs/t6stjan2000.pdf>>).

¹⁵³ See *supra* text accompanying note 152. But see David Mastio, *EPA Ready to Clear Flint Mill*, THE DETROIT NEWS, Oct. 30, 1998 (visited Feb. 26, 1999) <<http://www.detnews.com/1998/biz/9810/30/10300141.htm>> [hereinafter Mastio, *Flint Mill*] (indicating that approximately two dozen complaints were currently pending at the time of publication).

¹⁵⁴ See generally Cole & Shanklin, *supra* note 74, at Col. 1 (discussing the background of the Shintech permit and the EPA investigation through July 1998); Leonard Gray, *Shintech Leaving St. James, Heading to Plaquemine*, L'OBSERVATEUR (Sept. 21, 1998) <<http://www.lobserveur.com/news/stories/98092101n.html>> (detailing Shintech's decision to leave St. James and avoid further permit disputes with EPA); McKinney, *supra* note 128, at 17B (comparing the Shintech regulatory case to a similar private right of action brought in Pennsylvania); Sive & Srolovic, *supra* note 74, at Col. 1 (explaining EPA's process for determining discriminatory effects as applied in the Shintech case).

¹⁵⁵ See Mastio, *Flint Mill*, *supra* note 153.

¹⁵⁶ David Cagnolatti, *New EPA Skullduggery on Environmental Justice* (visited Feb. 26, 1999) <<http://www.junkscience.com/nov98/cagnolatt.htm>> (reporting that "[t]he Shintech saga has taken a bizarre turn"); McKinney, *supra* note 128, at 17B (observing that "Pa. Case Similar to Shintech Saga").

common battle of values between environmental justice advocates and business and economic concerns.¹⁵⁷ The case, although prematurely terminated by Shintech's withdrawal from the community, was anticipated to be the first decision made under the Interim Guidance.¹⁵⁸ Before EPA released its final decision regarding the disposition of Shintech's permit (discussed in section IV.B.2 of this article), the chemical company suspended its plans to build in the Convent community of St. James Parish, Louisiana, narrowly averting a precedent-setting "national test case."¹⁵⁹

In August 1997, EPA's Office of Civil Rights began an investigation of Shintech, Inc., a plastics manufacturing company based in Louisiana, in response to a Title VI administrative complaint filed by the Tulane Environmental Law Clinic.¹⁶⁰ The complaint alleged that the Louisiana Department of Environmental Quality's (LDEQ) issuance of a permit to Shintech violated Title VI and President Clinton's Executive Order No. 12,898 because it created a disparate impact of

¹⁵⁷ See Cole & Shanklin, *supra* note 72, at Col. 1; see, e.g., Cagnolatti, *supra* note 156; Gray, *supra* note 154; Vicki Ferstel, *Shintech Becomes Test Case: EPA Trying to Apply New, Vague Order* (last updated on Sept. 12, 1997) <http://www.leanweb.org/Shintech_becomes_test_case.html>; U.S. Chamber: *EPA's Mandated Relocation Costs More Jobs than Expected* (visited Feb. 27, 1999) <<http://www.uschamber.org/media/releases/October98/100198.htm>> [hereinafter *U.S. Chamber*]. See *infra* notes 386–90 and accompanying text for an in-depth treatment of the Shintech demographic analysis.

¹⁵⁸ See Cole & Shanklin, *supra* note 72, at Col. 1; Gray, *supra* note 154.

¹⁵⁹ Alan Sayre, "Environmental Racism" Site Could be Abandoned (last updated on Sept. 18, 1998) <<http://www.sddt.com/files/librarywire.09/09/8/1v.html>>.

¹⁶⁰ See Cole & Shanklin, *supra* note 72, at Col. 1. The citizens' petition was co-written by the Tulane University Environmental Law Clinic and Greenpeace. See *Civil Rights Leaders Jackson and Lowery Urge EPA to Stop Louisiana Plant in Major Rights Case* [hereinafter *Civil Rights Leaders*] (last updated Aug. 26, 1997) <<http://lists.essential.org/1997/dioxin-1/msg00313.html>>. In filing the petition, the law clinic represented St. James Citizens for Jobs and the Environment, as well as other groups that opposed the plant. See Ferstel, *supra* note 157. In what became an unusual offshoot to the EPA complaint, Louisiana Governor Murphy "Mike" Foster staged a counterattack against Tulane University, threatening to strip the university of its state tax exemptions. See *Foster Battles with Tulane Over Shintech* (visited Feb. 27, 1999) <<http://www.amrivers.org/mm/foster1097.html>> [hereinafter *Foster Battles*]. The governor, who supported the \$700 million Shintech facility, called the law clinic, "a bunch of vigilantes" and characterized Tulane faculty members as, "big, fat professors drawing big salaries trying to run [business] people out of the state." *Id.* (alteration in original). Explaining his position, Governor Foster added:

I have problems with a university that has some public [tax] breaks being used to run people out of the state that live up to the laws of the state. Boycotts seem to work with all kinds of groups. Now I'm not boycotting Tulane. I like Tulane. But I am telling some of the alumni to think about their support.

Id. (alteration in original).

environmental burdens based on race.¹⁶¹ The law clinic pointed to the surrounding community's predominantly black racial composition, the fact that half of the residents earn \$15,000 per year or less,¹⁶² and the significant environmental burdens already impacting the area.¹⁶³ The proposed plant was to be located in Convent, a town in the industrial corridor between Baton Rouge and New Orleans already known as "cancer alley" because of the number of petrochemical industries within its boundaries.¹⁶⁴

While EPA worked to conduct an appropriate statistical analysis, debate ballooned around the ongoing environmental justice investigation.¹⁶⁵ The battle lines were drawn: allegations of "endangering the

Following a discussion between the Governor and state business leaders, in the summer of 1997, the New Orleans Business Council, the New Orleans Chamber of Commerce, and the Louisiana Association of Business and Industry requested an investigation by the Louisiana Supreme Court into the legal activities of the Tulane Law Clinic, and that the clinic be restricted from such activities. *See Environmental Law Clinic Raises Environmental Justice . . . And a Hostile Reaction From the Governor and the Louisiana Supreme Court*, TUL. ENV'T'L L. NEWS, Winter 1999, 1, 16–17 [hereinafter *Law Clinic*]. After a nine-month investigation into the law school clinics at Loyola, Southern, and Tulane law schools, the state Supreme Court amended Louisiana's student practice rule. *See id.* The rules now prohibit clinics from representing any community organization that is affiliated with a national organization, any clients not eligible under the federal Legal Services Corporation (LSC) guidelines (which defines a poverty income for one person as \$10,063 and for a family of two as \$13,000), any community organization with more than 49% of its members outside of the LSC guidelines, or any clients with whom the legal clinic initiated contact and any organization which formed with assistance from the clinic. *See id.* at 17.

¹⁶¹ *See Law Clinic*, *supra* note 160, at 1. The Tulane Environmental Law Clinic specifically alleged that the effects of chronically high concentrations of toxic emissions were already borne disproportionately by the African-American town of Convent in St. James Parish (the airborne toxic emissions in the town already exceeded 16 million pounds annually—an amount 67 times higher than elsewhere in the parish, 93 times higher than the average of the Mississippi River industrial corridor, 129 times higher than the statewide average, and 658 times higher than the United States average), and that these levels would be intensified if Shintech was allowed to add over 3 million pounds of air pollution a year (including 600,000 pounds of toxic air pollution). *See id.*

The community organizations represented by the Tulane Environmental Law Clinic also petitioned EPA under Title V of the Clean Air Act to review and revoke the proposed air permits issued by the state authorities. *See id.* at 1, 16. In response to these Clean Air Act requests, EPA revoked the challenged air permits in September of 1997, marking the first time that EPA ever granted a citizen petition under the act. *See id.* at 16.

¹⁶² *See Cole & Shanklin*, *supra* note 72, at Col. 1; *Civil Rights Leaders*, *supra* note 160. Approximately 95% of the population within a one-mile radius of the proposed facility is African-American. *See Cole & Shanklin*, *supra* note 72, at Col. 1.

¹⁶³ *See Law Clinic*, *supra* note 160, at 1; *see also supra* text accompanying note 161.

¹⁶⁴ *Foster Battles*, *supra* note 160; *see Ferstel*, *supra* note 157.

¹⁶⁵ *See, e.g., Civil Rights Leaders*, *supra* note 160; *Ferstel*, *supra* note 157; *Foster Battles*, *supra* note 160; *Gray*, *supra* note 154; *Sayre*, *supra* note 159; *U.S. Chamber*, *supra* note 157.

health of vulnerable citizens"¹⁶⁶ who are "already overburdened"¹⁶⁷ with carcinogens and other pollutants associated with PVC production versus the potential loss of jobs and other economic benefits associated with the \$700 million proposed facility.¹⁶⁸ This conflict resulted in split allegiances within the greater African-American community, pitting the Reverend Jesse Jackson¹⁶⁹ and the Congressional Black Caucus¹⁷⁰ (urging EPA to stop the plant) against the National Black Chamber of Commerce¹⁷¹ and the local chapter of the NAACP¹⁷² (supporting the jobs and economic growth the plant would provide to the economically depressed community).

Shintech ultimately suspended plans to build the \$700 million facility in Convent and announced on September 17, 1998 that it would pursue instead a permit for a smaller \$250 million plant in the up-river town of Plaquemine, Louisiana.¹⁷³ While EPA did not issue a final disposition in the Shintech case, Administrator Browner characterized the corporation's decision as a positive one: "[t]he principles applied to achieve this solution should be incorporated into any blueprint for dealing with environmental justice issues in communities across the nation."¹⁷⁴ St. James Parish President Dale Hymel Jr., an advocate for industrial growth in the area, seemed to feel differently: "I don't see it as a major victory at all; the EPA dropped the ball."¹⁷⁵ However, Shintech President of Manufacturing, Erv Schroeder, gave assurances that the company would establish a broad outreach program to "give unprecedented influence to a community in siting a chemical factory" including "citizens forums [and] individual conversations with community residents"¹⁷⁶

¹⁶⁶ *Civil Rights Leaders*, *supra* note 160 (quoting Monique Harden, Greenpeace attorney).

¹⁶⁷ Ferstel, *supra* note 157 (quoting Bob Kuehn, Director of the Tulane Environmental Law Clinic).

¹⁶⁸ See *Foster Battles*, *supra* note 160; *U.S. Chamber*, *supra* note 157.

¹⁶⁹ See *Civil Rights Leaders*, *supra* note 160.

¹⁷⁰ See Sayre, *supra* note 159.

¹⁷¹ See *U.S. Chamber*, *supra* note 157. The Chamber of Commerce estimated that blocking the plant would result in a loss of 195 new jobs in the Convent community and would economically impact related industries such as transportation, communication, and retail. See *id.*

¹⁷² See Sayre, *supra* note 159.

¹⁷³ See *id.*; *Law Clinic*, *supra* note 161, at 16; *U.S. Chamber*, *supra* note 157.

¹⁷⁴ Sayre, *supra* note 159 (quoting Carol Browner, EPA Administrator).

¹⁷⁵ Gray, *supra* note 154 (quoting Dale Hymel Jr., President of St. James Parish).

¹⁷⁶ *Id.* (quoting Erv Schroeder, Shintech Vice President of Manufacturing).

b. *The Select Steel Case*

Although Shintech was anticipated to be EPA's test case for the Interim Guidance, the first case actually decided under the guidance came about a month and a half later. The case involved the Michigan Department of Environmental Quality's (MDEQ) issuance of a Prevention of Significant Deterioration (PSD) permit to the Select Steel Corporation of America for a steel recycling "mini-mill" in Genesee County, Michigan.¹⁷⁷ The Title VI complaint lodged with EPA by Father Phil Schmitter and Sister Joanne Chiaverini of the St. Francis Prayer Center in June of 1998 alleged that the proposed steel mill would cause degradation of air quality and public health effects that would disproportionately impact "a group of minority . . . people."¹⁷⁸ Specifically, the complainants were concerned about emissions of volatile organic compounds (VOCs)—lead, air toxics, and dioxin.¹⁷⁹ The complainants also alleged discrimination in the public participation process, citing improprieties in the permitting process, the manner of publication of the notice of the permit hearing, and the location of the hearing.¹⁸⁰ Following its review of the allegations, on October 30, 1998, EPA's Office of Civil Rights determined that the situation did not result in a discriminatory effect because the health effects alleged would not create an "'adverse' effect on the community" and the public had ample opportunity for participation.¹⁸¹ EPA thus dismissed the claim.¹⁸²

The crux of EPA's *Select Steel* decision was the agency's reasoning that "[i]f there is no adverse effect from the permitted activity, there can be no finding of a discriminatory effect which would violate Title VI and EPA's implementing regulations."¹⁸³ Using this logic, EPA first looked at the proposed plant's projected contributions of VOCs and asked whether those emissions would affect the area's compliance with the national ambient air quality standards (NAAQS) for ozone.¹⁸⁴ EPA determined that the new plant would not affect compliance with

¹⁷⁷ See Letter from Ann E. Goode, Director, EPA's Office of Civil Rights, to Father Phil Schmitter & Sister Joanne Chiaverini, Co-Directors, St. Francis Prayer Center, at 2 (Oct. 30, 1998) (available at <<http://www.epa.gov/region5/steelcvr.htm>>) [hereinafter *Select Steel* Letter].

¹⁷⁸ See *id.*

¹⁷⁹ See *id.*

¹⁸⁰ See *id.* at 5.

¹⁸¹ See *id.* at 2.

¹⁸² See *Select Steel* Letter, *supra* note 177, at 6.

¹⁸³ *Id.* at 2.

¹⁸⁴ See *id.* at 3.

the NAAQS.¹⁸⁵ Because the NAAQS provide a health-based standard that was set at a presumptively sufficient level to protect public safety, EPA reasoned that there could be no adverse impacts to the affected population when the VOC emissions are within levels prescribed by the NAAQS.¹⁸⁶ Where there are no "adverse impacts," there can be no violation of Title VI or EPA's implementing regulations.¹⁸⁷ EPA's investigation into lead levels proceeded similarly; EPA determined that because the steel facility would not affect the area's compliance with the NAAQS for lead, the affected population would suffer no "adverse" impacts from the facility.¹⁸⁸

To determine whether the level of air toxins the plant was projected to generate would create adverse health effects, EPA asked whether the airborne concentrations would exceed "thresholds of concern under State air toxins regulations."¹⁸⁹ EPA also considered other major sources of air toxin emissions in the surrounding area, but ultimately found no "adverse" impact in the immediate vicinity of the proposed mill.¹⁹⁰ Finally, EPA considered dioxin, stating that "[n]o performance specifications for continuous emissions monitoring systems have been promulgated by the EPA to monitor dioxins."¹⁹¹ Without a proven monitor, EPA noted that MDEQ had been unable to place such a requirement on Select Steel in the PSD permit.¹⁹² Therefore, EPA concluded that there was "no discriminatory effect associated with MDEQ's decision not to include monitoring requirements for dioxin and that MDEQ did not violate Title VI or EPA's implementing regulations."¹⁹³

Following EPA's treatment of the claims regarding adverse health effects, it considered the allegations of improprieties in the permit process and notice requirements.¹⁹⁴ EPA found no procedural improprieties or notice violations on the part of MDEQ, and stated that MDEQ's notice was adequate in part, "because the Complainants took it upon themselves to contact other members of the community."¹⁹⁵

¹⁸⁵ *See id.*

¹⁸⁶ *See id.*

¹⁸⁷ *See Select Steel Letter, supra* note 177, at 3.

¹⁸⁸ *See id.* at 3-4.

¹⁸⁹ *Id.* at 4.

¹⁹⁰ *See id.*

¹⁹¹ *Id.*

¹⁹² *See Select Steel Letter, supra* note 177, at 4.

¹⁹³ *Id.* at 4.

¹⁹⁴ *See id.* at 4-5.

¹⁹⁵ *Id.* at 5.

However, EPA concluded by recognizing that involving impacted communities early in the permitting process could have better addressed many of the complainants' issues.¹⁹⁶ "Such consultations will better ensure that communities are fairly and equitably treated with respect to the quality of their environment and public health, while providing State and local decision makers and businesses the certainty they deserve."¹⁹⁷

c. *Responses to Select Steel*

Given the recentness of the *Select Steel* decision, there has been no notable commentary on the way that the Interim Guidance was finally interpreted in practice. However, one steel industry commentator, Robert Chalfant, views the *Select Steel* decision as a mixed result.¹⁹⁸ On one hand, he applauds EPA for deciding that an impact must be "adverse" in order to create a disparate effect under Title VI.¹⁹⁹ Mr. Chalfant quotes the EPA decision with approval: "Some level of pollution is 'acceptable' when pollution sources are regulated under individual, facility-specific permits, recognizing society's demand for such things as power plants, waste-treatment systems, and manufacturing facilities."²⁰⁰ He also voices the concern, however, that the complaint held up the permit, and some pending complaints have cost some permittees years of delay.²⁰¹

Although the St. Francis Prayer Center has not released an official comment, Professor Sheila Foster sees the language of the Interim Guidance and the EPA decision in *Select Steel* as coalescing to create a high standard of liability for fund recipients in Title VI regulatory actions.²⁰² First, Professor Foster challenges EPA's treatment of

¹⁹⁶ See *id.* at 6.

¹⁹⁷ *Select Steel* Letter, *supra* note 177, at 6.

¹⁹⁸ See Robert V. Chalfant, *Using Title VI to Thwart Mill Construction* (last modified Jan. 1999) <<http://www.newsteel.com/features/NS9901en.htm>>.

¹⁹⁹ See *id.*

²⁰⁰ *Id.*

²⁰¹ See *id.* This "hold up" was ultimately fatal to the Select Steel Company's plans in Genesee Township. See Henry Payne, 'Environmental Justice' A Dilemma for Cities, PITTSBURGH POST-GAZETTE, May 15, 1999, at A9. In April, 1999, Select Steel, "strangled in red tape" created by the Title VI complaint, relocated the proposed plant to Grand Ledge, a rural community near Lansing, Michigan. *Id.*

²⁰² See Foster, Interview, *supra* note 136. Although the St. Francis Prayer Center has not officially commented on EPA's application of the Interim Guidance, the group appealed the EPA's *Select Steel* decision in March, 1999. See David Mastio, *EPA Race Policy Costs Flint Plant: Lansing Gains from Environmental Justice Controversy*, THE DETROIT NEWS, March 2, 1999, at A1. In their appeal the prayer center stated:

"adverse" impacts in the decision. Essentially, she doubts EPA's logic in finding no disparate impact because the steel mill met the appropriate standards under EPA permitting regulations, i.e., it met the NAAQS; as there was no impact according to the permitting standards, there could be no disparate impact under Title VI.²⁰³ This logic does not take into account the existing health conditions in the community and seems to contradict the spirit behind the Interim Guidance's statement that, "merely demonstrating that the permit complies with applicable environmental regulations will not ordinarily be considered substantial, legitimate justification."²⁰⁴

Second, Professor Foster finds it troubling that the Interim Guidance allows consideration of only the proposed facility and other facilities in the area in determining whether negative health effects might be anticipated.²⁰⁵ This precludes looking at levels of toxins in the community as a whole, including existing levels of lead in area homes, rather than simply those that are directly connected with emissions.²⁰⁶ A more appropriate standard would consider the affected community as a whole.²⁰⁷

The EPA's decision in the Select Steel case is deeply flawed Because of the haste with which Select Steel was processed and decided, it is clear that Select Steel was not decided on the basis of sound evidence or analysis but for improper political reasons, including unrelenting political pressure from right-wing advocates and from Michigan decision makers.

Id. (quoting Julie Hurwitz, attorney for the St. Francis Prayer Center and a lawyer with the non-profit Sugar Law Center for Economic and Social Justice). In response to the prayer center's petition for appeal, EPA stood by the conclusions and analysis of its original decision, but refused to issue a formal response as "EPA's regulations implementing Title VI of the Civil Rights Act of 1964, as amended, make no provision for the Petition." Letter from Ann E. Goode, Director, EPA's Office of Civil Rights, to Julie H. Hurwitz, Executive Director, National Lawyer's Guild/Sugar Law Center for Economic and Social Justice, Luke Cole, General Counsel, Center of Race, Poverty & the Environment, California Rural Legal Assistance Foundation, Susana Almanza, People Organized in Defense of Earth and Her Resources, Elizabeth Teel, Supervising Attorney, Tulane Environmental Law Clinic, Ross Richard Crow, Sahs & Associates, Grover Hankins, Thurgood Marshall School of Law (July 29, 1999).

²⁰³ See Foster, Interview, *supra* note 136.

²⁰⁴ Interim Guidance, *supra* note 98, at 12. Although this language is found in the "justification" section of the document, it seems elementary that if EPA contemplated that if a permit in compliance could reach the justification stage of the Title VI process, then it must have earlier been found to have had an "adverse effect" and a discriminatory impact on the community in question.

²⁰⁵ See Foster, Interview, *supra* note 136.

²⁰⁶ See *id.*

²⁰⁷ See *id.*

As administrative and political battles were waged over agency procedures and standards for enforcing EPA's Title VI regulations, a parallel debate ensued in federal courts over the availability of a private right of action under the act. While Executive Order 12,898 states that it does not create a private right of action,²⁰⁸ the EPA Interim Guidance permits individuals to "file a private right of action in court to enforce the nondiscrimination requirements in Title VI or EPA's implementing regulations without exhausting administrative remedies."²⁰⁹ Despite the wording of the guidance, it is uncertain whether Title VI allows individuals to enforce the EPA regulations.

The recognition of a private right of action under Section 602 and EPA's implementing regulations are central to determining whether Title VI will serve as a tool for environmental justice. Although filing a complaint with EPA is relatively inexpensive and is often enough to convince a private permittee to relocate,²¹⁰ regulatory enforcement has disadvantages. A complainant has no right to participate in EPA's investigation and there are no time limitations imposed on the agency.²¹¹ Even if EPA finds that a fund recipient has engaged in discrimination, EPA's power to revoke funding is severely constrained by procedural safeguards²¹² and there is no possibility of direct relief to the complainant or compensation for attorney's fees.²¹³ Finally, not once in the history of the agency's civil rights enforcement has EPA found a fund recipient to be in violation of Title VI.

In contrast, a private right of action under Title VI would afford expanded rights to a complainant. A lawsuit alleging disparate impact would provide an opportunity for a plaintiff to conduct her own in-

²⁰⁸ See Exec. Order 12,898, *supra* note 88, § 6-609; see also Sive & Srolovic, *supra* note 74, at Col. 1.

²⁰⁹ Interim Guidance, *supra* note 98, at 4.

²¹⁰ Telephone Interview with Jerome Balter, Counsel for Chester Residents Concerned for Quality Living, Public Interest Law Center of Philadelphia (Mar. 24, 1999); see also Mank, *Private Cause of Action*, *supra* note 66, at 23 n.132; *supra* text accompanying notes 156-76. Professor Mank additionally explains that an EPA complaint can be used to galvanize political opposition to a plant and, given the expense to the fund recipient of appealing a negative decision, the recipient will likely agree to cancel or relocate the challenged project. See Mank, *Private Cause of Action*, *supra* note 66, at 23.

²¹¹ See Mank, *Private Cause of Action*, *supra* note 66, at 22 (citing *Cannon v. University of Chicago*, 441 U.S. 677, 706 n.41 (1979); Arthur R. Block, *Enforcement of Title VI Compliance Agreements by Third Party Beneficiaries*, 18 HARV. C.R.-C.L. L. REV. 1, 10 (1983); Cole, *supra* note 3, at 321; Fisher, *supra* note 2, at 316).

²¹² See *supra* text accompanying notes 116-20; see also Mank, *Private Cause of Action*, *supra* note 66, at 22-23.

²¹³ See Protection of Environment, 40 C.F.R. § 7.130(a); see also Mank, *Private Cause of Action*, *supra* note 66, at 23.

vestigation with full discovery,²¹⁴ allow her to determine what evidence to present,²¹⁵ and would open the possibilities of equitable relief²¹⁶ and the recovery of attorney's fees.²¹⁷ Although the high costs of hiring a lawyer and conducting a thorough private investigation are clear disadvantages, especially because the court ultimately may not grant the injunction or even attorney's fees, some commentators feel that the advantages of filing a private suit for disparate impact under Title VI outweigh the disadvantages.²¹⁸ Whether courts will even recognize such claims, however, is not settled.

III. SECTION 602 AS A PRIVATE RIGHT OF ACTION

While Section 601 of Title VI provides a private cause of action for intentional acts of discrimination on the basis of race,²¹⁹ it is less certain whether the disparate impact standard of Section 602 is available to private plaintiffs.²²⁰ Although court decisions in the mid 1980s may have implied a private right of action for discriminatory effects under Title VI,²²¹ the issue was not directly addressed in an environmental permitting context until 1996 in *Chester Residents Concerned for Quality Living v. Seif*.²²²

²¹⁴ See Mank, *Private Cause of Action*, *supra* note 66, at 24; Colopy, *supra* note 66, at 167.

²¹⁵ See Mank, *Private Cause of Action*, *supra* note 66, at 24; Colopy, *supra* note 66, at 167.

²¹⁶ See Mank, *Private Cause of Action*, *supra* note 66, at 24; Colopy, *supra* note 66, at 167; see also *infra* note 446 and accompanying text.

²¹⁷ See Mank, *Private Cause of Action*, *supra* note 66, at 24 (citing Civil Rights Attorney's Fees Act of 1976, 42 U.S.C. § 1988(b)); Colopy, *supra* note 66, at 166 n.194; see also *infra* text accompanying notes 446–64.

²¹⁸ See Mank, *Private Cause of Action*, *supra* note 66, at 24.

²¹⁹ See *supra* text accompanying notes 70–77.

²²⁰ See, e.g., Jeffrey A. Cohen & Karen A. Mignone, *Environmental Justice for Citizen Group: 3d. Cir. Creates New Obstacle to Waste Facility Siting Permits*, ENVTL. COMPLIANCE & LITIG. STRATEGY, April 1998, at 1 (explaining that courts had traditionally "limited citizen suits to Sec. 601 of [Title VI], which . . . required plaintiffs to show discriminatory intent to maintain a claim."); Cole & Shanklin, *supra* note 72, at Col. 1 (reporting that "it is uncertain whether a private right of action exists that would allow plaintiffs to directly enforce [EPA] regulations."); But see Lazarus, *supra* note 7, at 835 (stating that it is "well settled that Title VI provides an implied private right of action on behalf of individuals who have suffered discrimination deemed unlawful by Title VI.") (citing *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582, 593–95 (1983)).

²²¹ See *infra* notes 449–53 and text accompanying text.

²²² See 944 F. Supp. 413, 413–18 (E.D. Pa. 1996) *rev'd*, 132 F.3d 925 (3d Cir. 1997) and *vacated*, 119 S. Ct. 22 (1998).

A. *The Factual and Procedural Background of Chester*

Chester Residents Concerned for Quality Living (CRCQL), a citizens group, brought suit on May 22, 1996, against the Pennsylvania Department of Environmental Protection (PADEP) challenging the issuance of permits to construct a waste treatment facility in the town of Chester in Delaware County, Pennsylvania.²²³ The formerly industrial city of 39,000²²⁴ is now home to low-income people of color, 100% of Delaware County's solid waste treatment plants, and 85% of the county's raw sewage and sludge treatment plants.²²⁵ Chester further faces the highest infant mortality rate and the highest death rate from certain malignant tumors in Pennsylvania.²²⁶ While Chester has a sixty-five percent African-American population, the remainder of Delaware County is ninety-one percent white.²²⁷

CRCQL challenged PADEP's issuance of a permit to Soil Remediation Services, Inc. (SRS) to operate a waste treatment facility and alleged violations of both Sections 601 and 602 of Title VI.²²⁸ The citizen group asserted that the process PADEP employed to issue waste facility permits effectively discriminated against its members by "concentrating the burden of pollution and the negative health effects it causes," in predominantly African-American Chester.²²⁹ The CRCQL complaint alleged that from 1987 to 1996, PADEP granted five permits for waste facilities in Chester, while only two permits were issued in the rest of the county.²³⁰ Significantly, the five Chester permits allowed an increase in waste processing capacity of 2.1 million tons per year, in addition to the permit capacity of 44 million gallons of sewage and 17,500 tons of sludge already operating in Chester.²³¹ In contrast, the two waste permits granted for facilities outside of the city each had a permit capacity of 700 tons per year.²³² The only census tracts in the county that contained multiple waste facilities were located in

²²³ See *id.*

²²⁴ See Foster, *Justice*, *supra* note 35, at 779.

²²⁵ See *Chester*, 944 F. Supp. at 414-15.

²²⁶ See *id.* at 415.

²²⁷ See *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925, 927 n.1 (3d Cir. 1997).

²²⁸ See *Chester*, 944 F. Supp. at 415. Defendants in the suit were James M. Seif (the Commonwealth's Secretary), Carol R. Collier (PADEP's Director of the Southeastern Region), PADEP, and PADEP's Southeastern Regional subdivision. See *id.*

²²⁹ *Id.*

²³⁰ See *id.*

²³¹ See *id.*

²³² See *id.*

predominantly African-American communities.²³³ According to CRCQL, PADEP's process of determining the issuance of permits left "the white residents of Delaware County essentially free of the pollution their waste caused."²³⁴

The district court dismissed with leave to amend CRCQL's Section 601 claim of intentional discrimination, finding that the plaintiff's allegations amounted to only a disparate effect, not discriminatory intent.²³⁵ Although the court found that PADEP's failure to rectify its permitting procedure amounted to a discriminatory effect on the basis of race,²³⁶ the court dismissed with prejudice CRCQL's claims that PADEP violated EPA's regulations promulgated under Section 602 of Title VI²³⁷ because it found no private cause of action under these regulations.²³⁸

²³³ See *Chester*, 944 F. Supp. at 415.

²³⁴ *Id.*

²³⁵ See *id.* at 417; see also *supra* text accompanying notes 70–77. Section 601 of Title VI of the Civil Rights Act of 1964 provides that, "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1999).

The district court indicated that, based on CRCQL's briefs, not its complaint, it appeared as though the plaintiff could potentially carry a Title VI, Section 601 intentional discrimination claim. See *Chester*, 944 F. Supp. at 416. Following a recital of CRCQL's factual allegations, the court quoted with approval CRCQL's brief, which characterized PADEP's failure to rectify "their failed waste permit program" as the "functional equivalent of a smoking-gun intentional discrimination." See *id.* This failure to rectify could be sufficient to raise an inference of invidious intent based on the fact that the defendant's actions had the "clear and obvious effect of subjecting African Americans to discrimination." See *id.* (quoting Plaintiffs' Response Brief at 9). The court, however, found that the plaintiff must have specifically raised an allegation of discriminatory intent in its pleadings, rather than alleging that a discriminatory effect states an implied right of action, or attempting to amend its complaint with the "smoking-gun" argument in its briefs. See *id.* Therefore, the court was compelled to dismiss CRCQL's Section 601 complaint, but granted the plaintiffs fifteen days to amend. See *id.* at 417.

²³⁶ See *Chester*, 944 F. Supp. at 414.

²³⁷ See *id.* at 417–18. Section 602 of Title VI authorizes agencies which provide federal financial assistance, reading "to effectuate the provisions of section 2000d of this title . . . by issuing rules, regulations, and orders of general applicability which shall be consistent with achievement of the objectives of the statute . . ." 42 U.S.C. § 2000d-1. As authorized by Section 602, EPA has promulgated regulations relating to civil rights. First:

A recipient [of federal funds] shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, national origin, or sex.

In coming to this conclusion, the court relied upon the 1979 Third Circuit Court of Appeal's decision of *Chowdhury v. Reading Hospital & Medical Center*,²³⁹ which the district court construed as holding that "there is no private right of action under regulations promulgated under Section 602 of Title VI."²⁴⁰ The district court characterized *Chowdhury* as reasoning that because plaintiffs do not need to exhaust administrative remedies under Section 602,²⁴¹ there is a "basic reality" that Title VI regulations do not give individuals a role in the enforcement of administrative regulations.²⁴² Therefore, the court relied upon its understanding of the controlling authority of *Chowdhury* and refused to find a private cause of action under EPA regulations promulgated under Title VI, Section 602.²⁴³

B. CRCQL's Third Circuit Appeal

CRCQL chose not to amend its Section 601 claim of intentional discrimination²⁴⁴ and instead appealed the district court's decision regarding whether a private right of action exists under which indi-

40 C.F.R. § 7.35(b). Additionally, "[a]pplicants for EPA assistance [shall] submit an assurance with the applications stating that, with respect to their programs or activities that receive EPA assistance, they will comply with the requirements of this part." 40 C.F.R. § 7.80(a).

²³⁸ See *Chester*, 944 F. Supp. at 417-18.

²³⁹ *Id.* at 417; see *Chowdhury v. Reading Hosp. & Med. Ctr.*, 677 F.2d 317 (3d. Cir. 1979).

²⁴⁰ *Chester*, 944 F. Supp. at 417 (E.D. Pa. 1996) (citing *Chowdhury*, 677 F.2d at 319-20).

²⁴¹ See *id.* (citing *Chowdhury*, 677 F.2d at 321). *Chowdhury*, which was not an environmental case, explored the question of whether a plaintiff must exhaust all administrative remedies before suing under Title VI. See *id.* The *Chester* court quoted *Chowdhury* in that regard:

Congress explicitly provided for an administrative enforcement mechanism, contained in Section 602, by which the funding agency attempts to secure voluntary compliance and, failing that, is empowered to terminate the violator's federal funding. Under the regulations promulgated pursuant to this section, an aggrieved individual may file a complaint with the funding agency but has no role in the investigation or adjudication, if any, of the complaint. The only remedies contemplated by the language of the Act and the Regulations are voluntary compliance and funding termination. There is no provision for a remedy for the victim of the discrimination, such as injunctive relief or damages.

Id. (quoting *Chowdhury*, 677 F.2d 319-20).

²⁴² See *id.*

²⁴³ See *id.* at 417-18.

²⁴⁴ See *id.* at 928. Because CRCQL informed the district court that it would not be amending its Section 601 claim, the district court entered final judgment to dismiss on that count. See *id.*

viduals can enforce EPA's civil rights regulations.²⁴⁵ On December 30, 1997, the Third Circuit Court of Appeals reversed the district court and, in a (temporary) landmark decision, held that private plaintiffs may maintain an action under the discriminatory effect civil rights regulations of administrative agencies.²⁴⁶ Noting the district court's reliance on *Chowdhury*, the court of appeals stated that jurisprudence after the 1979 *Chowdhury* decision lent support for a private right of action to enforce administrative regulations, and that *Chowdhury* did not apply the appropriate test for determining when a private right of action can be implied.²⁴⁷

After generally reaffirming the scheme of Title VI,²⁴⁸ the court looked to the 1983 and 1985 Supreme Court decisions of *Guardians Association v. Civil Service Commission*²⁴⁹ and *Alexander v. Choate*²⁵⁰ to determine whether CRCQL could proceed under the discriminatory effect standard of EPA's regulations promulgated under Section 602. Although the *Chester* court inferred that a majority of the Supreme Court in *Guardians* had endorsed a private right of action, the court did not find this to be dispositive because *Guardians* had not directly addressed the availability of a private right of action under discriminatory effect implementing regulations.²⁵¹ The *Chester* court also considered the Supreme Court's subsequent *Alexander* decision, but found that "*Alexander* spoke in the passive voice – 'could make actionable' –

²⁴⁵ See *Chester*, 944 F. Supp. at 927.

²⁴⁶ See *id.* at 926, 937.

²⁴⁷ See *id.* at 927.

²⁴⁸ Reaffirming the scheme of Title VI, the *Chester* court stated that a private right of action under Section 601 reaches instances of intentional discrimination and that Section 602 authorizes agencies that distribute federal funds to promulgate regulations that implement Section 601. See *id.* at 929 (citing *Alexander v. Choate*, 469 U.S. 287, 293 (1985)). The court found that the EPA implementing regulation "clearly incorporates a discriminatory effect standard." *Id.* Further, the Third Circuit cited the United States Supreme Court for the authority that agencies may validly promulgate regulations incorporating such a standard. See *id.* (citing *Alexander*, 469 U.S. at 292–94).

²⁴⁹ 463 U.S. 582 (1983).

²⁵⁰ 469 U.S. 287 (1985).

²⁵¹ See *Chester*, 132 F.3d at 930. Although *Guardians* was a divided decision with five separate opinions, the Supreme Court later made it clear in *Alexander* that *Guardians* "stands for at least two propositions: 1) a private right of action exists under Section 601 of Title VI that requires plaintiffs to show intentional discrimination; and 2) discriminatory effect regulations promulgated by agencies pursuant to Section 602 are valid exercises of their authority under that section." *Id.* at 929 (citing *Alexander*, 469 U.S. at 292–94). The Third Circuit found that, while *Guardians* did not explicitly address the issue of whether a private right of action exists under discriminatory effect regulations, five Justices (Justices White, Marshall, Stevens, Brennan, and Blackmun) agreed in that decision that injunctive and declaratory relief are available in discriminatory effect cases. See *id.* at 930.

and did not indicate whether *Guardians* stood for the proposition that a private plaintiff . . . could proceed under a disparate impact standard.”²⁵² Similar to its treatment of *Guardians*, the Third Circuit declined to rely on *Alexander* because it could find no direct authority in the decision that confirmed a private right of action.²⁵³

Finding no authority from the Supreme Court directly on point, the *Chester* court next considered decisions from its own circuit.²⁵⁴ Although the district court had relied on the Third Circuit’s twenty-year-old *Chowdhury* decision in addressing CRCQL’s Section 602 claim, the appellate court rejected this analysis, stating that “*Chowdhury* says nothing about the appropriateness of implying a private right of action.”²⁵⁵ Because the *Chester* court found no Third Circuit precedent on point,²⁵⁶ it applied the test that the Third Circuit set forth in 1998 in *Polaroid Corporation v. Disney*²⁵⁷ that determines when it is appropriate to imply a private right of action to enforce agency regulations.²⁵⁸ The three-prong test asks: (1) whether the agency rule is properly within the scope of the enabling statute; (2) whether the statute under which the rule was promulgated properly permits the implication of a private right of action; and (3) whether implying a private right of action will further the purpose of the enabling statute.²⁵⁹

²⁵² *Id.* at 931. The Third Circuit also considered the subsequent *Alexander* decision, in which the Supreme Court stated “*Guardians* suggests that the regulations [of the Rehabilitation Act] . . . could make actionable the disparate impact challenged” *See id.* at 931 (quoting *Alexander*, 469 U.S. at 294).

²⁵³ *See id.*

²⁵⁴ *See id.* at 932.

²⁵⁵ *Id.* at 932. The court of appeals characterized the *Chowdhury* decision as addressing the extent to which Section 602 and its implementing regulations allowed private plaintiffs a peripheral role in administrative proceedings. *See id.* *Chowdhury* determined that this peripheral role indicated that plaintiffs should not have to pursue a regulatory remedy before initiating a direct action under Section 601. *See id.*

²⁵⁶ The *Chester* court considered but declined to rely on “dicta” from the previous Third Circuit decision of *Pfeiffer v. Marion Center Area School District*, 917 F.2d 779 (3d Cir. 1990), which arguably interpreted *Guardians* as allowing a private right of action. *See Chester*, 132 F.3d at 932–33. The *Chester* court quoted the language in question: “[a] . . . majority [in *Guardians*] seemed to suggest that proof of discriminatory effect suffices to establish liability when suit is brought to enforce the regulations rather than the statute itself.” *Id.* at 932 (quoting *Pfeiffer*, 917 F.2d at 788). The *Chester* court differentiated *Pfeiffer* by clarifying that it had addressed discriminatory intent, not discriminatory effect, that it did not consider the status of a private right of action under Section 602, and that *Pfeiffer* did not specify who may bring suit to enforce the regulations. *See id.* at 933.

²⁵⁷ 862 F.2d 987, 994 (3d Cir. 1988).

²⁵⁸ *See Chester*, 132 F.3d at 933.

²⁵⁹ *Id.* (quoting *Polaroid Corp.*, 862 F.2d at 994) (citations omitted).

As to the first prong of the test, the *Chester* court found that EPA's discriminatory effect regulations are within the scope of Title VI.²⁶⁰ The court determined that the first prong was met because "actions having an unjustifiable disparate impact on minorities [can] be redressed through agency regulations designed to implement the purposes of Title VI."²⁶¹

To address the second prong of the test, whether the statute under which the rule was promulgated properly permits the implication of a private right of action, the court considered two of the factors set forth by the Supreme Court in *Cort v. Ash*²⁶²: "(1) whether there is 'any indication of legislative intent, explicit or implicit, either to create such remedy or to deny one'; and (2) whether it is 'consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff.'"²⁶³ In applying the first *Cort* factor, the *Chester* court asked whether Congress indicated an intent to create a private right of action when it amended Title VI.²⁶⁴ To decide whether the act's legislative history evidenced a congressional understanding of the discriminatory effect regulations and an intent that private parties could enforce them, the *Chester* court considered a House Report on an early version of the bill,²⁶⁵ two legislators' comments in the *Congressional Record*,²⁶⁶ and a compilation of congressional hearings testi-

²⁶⁰ See *id.*

²⁶¹ *Id.* at 933 (quoting *Alexander*, 469 U.S. at 293).

²⁶² 422 U.S. 66 (1975).

²⁶³ *Chester*, 132 F.3d at 933 (quoting *Cort*, 422 U.S. at 78).

²⁶⁴ See *id.* According to the court, "[t]he purpose of the amendment was to broaden the scope of the coverage of Title VI in response to the Supreme Court's decision in *Grove City College v. Bell*, 465 U.S. 555 (1984), where the Court narrowly construed the terms 'program or activity.'" *Id.* (citations omitted).

²⁶⁵ See *Chester*, 132 F.3d at 934. The version of the bill stated that the "private right of action which allows a private individual or entity to sue to enforce Title IX would continue to provide the vehicle to test [certain] regulations in Title IX and their expanded meaning to their outermost limits." H.R. REP. NO. 99-963, pt. 1, (1986). The *Chester* court noted that courts have traditionally regarded Title IX and Title VI jurisprudence as largely interchangeable and that the drafters of Title IX explicitly assumed that it would be interpreted and applied as had Title VI. See *Chester*, 132 F.3d at 934 n.12 (citing *Cannon v. University of Chicago*, 441 U.S. 677 (1979)).

²⁶⁶ See *Chester*, 132 F.3d at 934. The court examined the comments of Senator Hatch who stated:

The failure to provide a particular share of contract opportunities to minority-owned businesses, for example, could lead Federal agencies to undertake enforcement action asserting that the failure to provide more contracts to minority-owned firms, standing alone, is discriminatory under agency disparate impact regulations implementing Title VI Of course, advocacy

mony,²⁶⁷ which had been offered by the United States as amicus for CRCQL.²⁶⁸ Because PADEP could not cite any statements that undermined the evidence offered by the United States, the court found that there was "some indication" in the legislative history to create a private right of action in satisfaction of the first *Cort* factor.²⁶⁹

groups will be able to bring private lawsuits making the same allegations before federal judges.

Id. (quoting 134 CONG. REC. 4257 (1988)). Representative Fields stated similarly, "If a greater percentage of minority than white students fail a bar exam or a medical exam . . . will a State be subject to private lawsuits because the tests have a disproportionate impact on minorities . . ." *Id.* (quoting 130 CONG. REC. 18,880 (1984)).

²⁶⁷ See *id.* Among the compilations presented was a memorandum by the Office of Management and Budget (OMB) that stated that "every licensed attorney would be empowered to file suit to enforce the 'effects test' regulations of agencies, challenging practices in every aspect of every institution that receives any Federal assistance." *Id.* (quoting *Civil Rights Act of 1984: Hearings on S. 2568 Before the Subcomm. on the Const. of the Senate Comm. on the Judiciary*, 98th Cong. (1984)).

²⁶⁸ See *id.* at 933-34. The United States as amicus for the plaintiffs had advanced the arguments that the court ultimately relied upon as part of its larger theory that Congress had "acknowledged the existence of a privately enforceable discriminatory effects standard" when it amended Title VI with the Civil Rights Restoration Act of 1987. Amicus Brief of the United States at 19, *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925 (3rd Cir. 1997) (No. 97-1125). The United States asserted that during the congressional proceedings that preceded the enactment of the 1987 Act, "Congress was aware that the Supreme Court in *Guardians* had upheld agency discriminatory effects regulations as valid." *Id.* at 20. "Both supporters and opponents of the amendments expressly stated that private plaintiffs would be able to sue recipients of federal funds for violation of the regulations." *Id.* As support, the United States: (1) offered statements from a House Report on the early version of the bill (H.R. REP. NO. 99-963, pt. 1, (1986)), statements of Senator Hatch (134 CONG. REC. 4257 (1988)) and Representative Fields (130 CONG. REC. 18,880 (1984)); (2) noted that witnesses to the hearings claimed that the discriminatory effects regulations existed and could be enforced by private parties (*Civil Rights Restoration Act of 1985: Joint Hearing on H.R. 700 Before the House Comm. on Educ. & Labor and the Subcomm. on Civil & Const. Rights of the House Comm. on the Judiciary*, 99th Cong. 1095, 1099 (1985); *Civil Rights Act of 1984: Hearing on S. 2568 Before the Subcomm. on the Const. of the Senate Comm. on the Judiciary*, 98th Cong. 153-54, 200 (1984)); and (3) noted that the understanding of a private right of action was put forth by the executive branch in a memorandum from the OMB (*Civil Rights Act of 1984: Hearings on S. 2568 Before the Subcomm. on the Const. of the Senate Comm. on the Judiciary*, 98th Cong. 527 (1984)). See Amicus Brief of the United States at 20-22, *Chester* (No. 97-1125). The United States argued that, given Congress's awareness that the discriminatory effects regulations could be enforced by private parties, and given that Congress did not expressly indicate an intent not to allow private enforceability when it enacted the 1984 and 1987 amendments, Congress therefore ratified that the discriminatory effects standard would be open to private enforcement. See *id.* at 23.

The *Chester* court concluded that the above history constituted "some indication" of Congressional intent to imply a private right of action under the Title VI regulations, but did not cite to the United States's third argument regarding witnesses to the hearings. See *Chester*, 132 F.3d at 934; see *infra* text accompanying note 269.

²⁶⁹ See *Chester*, 132 F.3d at 934. PADEP countered the United States' argument by asserting that the sole purpose of the Civil Rights Restoration Act's amendment to Title VI was

The second *Cort* factor requires a court to determine whether it is "consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff" ²⁷⁰ According to PADEP, this was not the case because Section 602 and its regulations, which include strict notice, filing, and time line requirements, are meant to establish EPA as a gatekeeper to enforcement. ²⁷¹ PADEP also argued that the EPA regulations provide a sufficient administrative remedy to private parties who allege unintentional discrimination. ²⁷² Therefore, PADEP asserted, the appropriate legislative scheme for enforcing Section 602 and its regulations is for private parties to submit allegations of discriminatory effects to EPA, which will act as a discretionary gatekeeper. ²⁷³

In considering PADEP's arguments, the *Chester* court looked at the purpose of the procedural requirements of the EPA regulations and determined that their principal aim was to provide fund recipients with notice of investigation. ²⁷⁴ The court stated that a private lawsuit would afford a similar opportunity for notice to a fund recipient. ²⁷⁵ The court also clarified that the strict procedural requirements of the EPA regulations are in place because of the potentially onerous remedy under the regulatory scheme—loss of funding. ²⁷⁶ Because

to address the Supreme Court's 1984 decision in *Grove City College v. Bell*, 465 U.S. 555 (1984), by expanding the definition of the term "program or activity," not to consider a private right of action. See Brief for Appellees at 18, *Chester* (No. 97-1125). In *Grove City*, by narrowly defining the term "program or activity," the Supreme Court held that federal funds received by a subunit of an institution did not bring the entire institution within the nondiscrimination mandates of Title IX. See *Grove City*, 465 U.S. at 573; see also Mank, *Private Cause of Action*, *supra* note 66, at 42. PADEP argued that neither *Grove City*, nor the amendments, explicitly or implicitly addressed the private right of action issue regarding Title VI regulations. See Brief for Appellees at 18, *Chester* (No. 97-1125).

Additionally, PADEP cautioned that the comments cited by the United States might only reflect the viewpoints of those particular members of Congress, not the legislative intent as a whole and should not be construed as ratification. See *id.* at 19.

²⁷⁰ See Brief for Appellees at 19, *Chester* (No. 97-1125) (quoting *Cort v. Ash*, 422 U.S. 66, 78 (1975)).

²⁷¹ See *id.* PADEP specifically referenced the strict notice requirements, filing requirements, and time line delineated in the EPA regulations, but not in the statute, and argued that these strict procedural requirements would theoretically not apply to private plaintiffs, rendering a private right of action inappropriate. See Brief for Appellees at 19-22, *Chester* (No. 97-1125); see also 42 U.S.C. § 2000d-1 (1999); *Chester*, 132 F.3d at 935.

²⁷² See Brief for Appellees at 19, *Chester* (No. 97-1125) (citing 40 C.F.R. § 7.120(a)); see also *Chester*, 132 F.3d at 935.

²⁷³ See *Chester*, 132 F.3d at 935. According to PADEP, a private right of action would be inconsistent with this procedure. See *id.*

²⁷⁴ See *id.*

²⁷⁵ See *id.*

²⁷⁶ See *id.* at 936.

private plaintiffs could not effect such a remedy, the court reasoned that the need for such stringent requirements is not as significant in private rights of action.²⁷⁷ Thus, the court did not agree with PADEP's contention that implying a private right of action was inconsistent with the underlying purposes of the legislative scheme of Section 602.²⁷⁸

In sum, the court found both *Cort* factors had been met: (1) there was an indication of a legislative intent to create a private right of action; and (2) such a creation would be consistent with the legislative scheme of Title VI.²⁷⁹ Therefore, "the statute under which the rule was promulgated properly permits the implication of a private right of action," satisfying the second prong of the three-part test.²⁸⁰

Having found that the first two prongs of the test were met, the court turned to the third: "whether implying a private right of action will further the purpose of the enabling statute."²⁸¹ In this regard, the amicus United States argued that private litigation under Section 602 and the regulations would further the dual purposes of Title VI to fight discrimination by entities that receive federal funds and to offer citizens an effective defense against discrimination.²⁸² By "deputizing private attorneys general" who could enforce Section 602 and the implementing regulations, a private right of action would further both purposes of Title VI.²⁸³ To the extent that a private right of action would increase enforcement of Title VI, the court agreed with the amicus and found that the third prong of the test was met.²⁸⁴

After finding that all three prongs of the *Polaroid* test were satisfied, and, thus, that it would be proper to imply a private right of action to enforce the EPA regulations,²⁸⁵ the court reflected on deci-

²⁷⁷ See *id.* The court noted that while "it is well established that private plaintiffs do not have the authority to compel a termination of funding," it would not make a determination itself regarding appropriate relief. *Id.* at 935-36 & n.15 (citing *NAACP v. Medical Ctr., Inc.*, 599 F.2d 1247 n.27 (3d Cir. 1997); *Cannon v. University of Chicago*, 441 U.S. 677 (1979)). Instead, the *Chester* court stated that should relief be warranted, it would allow the district court to determine the appropriate remedy. See *id.*

²⁷⁸ See *Chester*, 132 F.3d at 936.

²⁷⁹ See *id.*

²⁸⁰ *Id.* (quoting *Polaroid Corp. v. Disney*, 862 F.2d 987, 994 (1998)).

²⁸¹ *Id.* (quoting *Angelastro v. Prudential-Bache Sec., Inc.*, 764 F.2d 939, 947 (3d Cir. 1985)).

²⁸² See *id.* (citing *Cannon*, 441 U.S. at 704).

²⁸³ See *Chester*, 132 F.3d at 936.

²⁸⁴ See *id.*

²⁸⁵ See *id.* at 933, 936.

sions in other jurisdictions.²⁸⁶ The *Chester* court acknowledged that the specific question at issue had not been addressed by other appellate courts and then cited holdings from eight other federal circuits that "indicate support" for its reasoning.²⁸⁷

In conclusion, on December 30, 1997, the Third Circuit reversed and remanded the district court decision, holding that private plaintiffs may maintain an action under the discriminatory effect regulations promulgated by federal agencies pursuant to Title VI, Section 602.²⁸⁸

C. The Supreme Court Appeal

Three months after the Third Circuit decision, PADEP filed a petition for a writ of certiorari, and on June 8, 1998, the Supreme Court granted certiorari to determine whether a private right of ac-

²⁸⁶ See *id.* at 936.

²⁸⁷ See *id.* at 936-37. The court cited ten decisions from eight different circuits. See *id.*

²⁸⁸ See *Chester*, 132 F.3d at 937. Professor Mank, in his substantive critique of the Third Circuit Court of Appeal's decision, argues that the *Chester* court's reasoning regarding the first and third factors of the *Polaroid* test was strong (i.e., EPA's regulations were properly within the scope of Title VI and a private right of action advances Title VI's purposes), yet he criticized the court's argument regarding the second factor, congressional intent. See Mank, *Private Cause of Action*, *supra* note 66, at 38-49. Professor Mank contends that the *Chester* court's evidence of intent fails in light of recent Supreme Court decisions addressing the amount of evidence that courts must weigh to find that Congress intended to establish a private right of action. See *id.* at 38-49, 44 n.255. Specifically, he argues that "several Supreme Court decisions suggest that a private right of action may be implied by courts only if the original Congress enacting the statute intended to create a private right, or a subsequent Congress explicitly amended the statute to do so." *Id.* at 44. Professor Mank also raises a question regarding the *Chester* court's reliance on subsequent legislative history. See *id.* at 44-45. In short, "[i]n 1964, when it enacted Title VI, Congress probably never considered whether it wished to establish a private right to sue under Section 602 or under 601. [And] [s]ubsequent Congresses have not resolved the issue . . ." See *id.* at 46.

Professor Mank, however, offers what he considers to be "a stronger argument than the Third Circuit's for concluding that EPA's regulations under Section 602 of Title VI create an implied right of action." *Id.* at 38. In this regard, he asserts that consistency with Section 601, for which the Supreme Court applied a more lenient standard to recognize a right of action, would be offended by applying today's more stringent standard to Section 602. See *id.* at 38, 53-58. This is especially so because "Sections 601 and 602 are interrelated and serve the same statutory purpose." *Id.* at 53. Although Professor Mank acknowledges that the evidence of legislative intent to create a private right of action under Title VI is relatively weak, he concludes that under the standards that the Supreme Court applied to Section 601 approximately 20 years ago, "the fact that a private right of action will protect Title VI's dual purposes of combating discrimination by fund recipients and protecting individual rights should be enough to imply that Congress intended to infer a private right of action under Title VI's Section 602 implementing regulations." *Id.* at 54, 58.

tion exists under Section 602 of Title VI.²⁸⁹ The case promised to be the seminal decision that settled the question of whether individuals could enforce EPA's potentially powerful disparate effect regulations. However, a procedural development at the state level ultimately led to a surprising result.

On December 6, 1996, PADEP denied SRS's request for a "plan approval permit" extension.²⁹⁰ SRS appealed the denial of this extension, and pursued three separate appeals, a process that was ongoing almost a year and a half later.²⁹¹ During the "plan approval permit" appeals process, on March 6, 1998, PADEP advised SRS that it was delinquent in making its bond payments for 1996 and 1997 (as required by SRS's "waste permit" and state law) and requested that SRS make immediate deposits.²⁹² On April 27, 1998, SRS notified PADEP that it wished to withdraw the "plan approval permit" and have all bonds and deposits returned.²⁹³ Three days later, PADEP officially revoked SRS's "plan approval permit," one month after the agency had filed its petition for a writ of certiorari.²⁹⁴

Three months after PADEP revoked SRS's "plan approval permit," CRCQL filed a motion to dismiss PADEP's writ petition as moot based on the revocation of SRS's permit and the fact that SRS no longer planned to operate in Chester.²⁹⁵ Essentially, CRCQL asserted that the permit revocation eliminated the actual controversy between the parties.²⁹⁶ CRCQL additionally argued that it no longer met the

²⁸⁹ See Respondent's Brief at 2, 5, *Seif v. Chester Residents Concerned for Quality Living* (U.S. 1998) (No. 97-1620) available in 1998 WL 435980. According to Jerome Balter, counsel for CRCQL, PADEP had originally indicated that it did not intend to appeal the Third Circuit's decision. See Balter, *supra* note 210. Shortly after the Third Circuit *Chester* decision, however, a separate private claim to enforce the U.S. Department of Education's regulations under Section 602 of Title VI was filed in a Pennsylvania District Court. See *Powell v. Ridge*, 1998 WL [804727] (E.D. Pa. 1998). When "the state powers that be" realized that another Title VI disparate impact challenge was following in the wake of *Chester*, the state decided to request certiorari. Balter, *supra* note 210. Mr. Balter indicated that both parties were surprised when the Supreme Court granted certiorari because the circuits were not split on the issue. See *Chester*, 132 F.3d at 936-37; Balter, *supra* note 210.

²⁹⁰ See Balter, *supra* note 210; Petitioner's Brief at 14, *Seif* (No. 97-1620) available in 1998 WL 470120.

²⁹¹ See Respondent's Brief at 4, *Seif* (No. 97-1620) available in 1998 WL 435980.

²⁹² See Petitioner's Brief at 15, *Seif* (No. 97-1620) available in 1998 WL 470120.

²⁹³ See *id.*; see also Respondent's Brief at 5, *Seif* (No. 97-1620) available in 1998 WL 470120.

²⁹⁴ See Respondent's Brief at 4-5, *Seif* (No. 97-1620) available in 1998 WL 470120.

²⁹⁵ See *id.* at 3-7; see also Mank, *Private Cause of Action*, *supra* note 66, at 50.

²⁹⁶ See Respondent's Brief at 3, 5, *Seif* (No. 97-1620) (citing *Preiser v. Newkirk*, 422 U.S. 395, 421 (1975) (holding that "[t]he rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed"))).

proper requirements for standing as the injury was no longer actual or imminent.²⁹⁷ Lastly, CRCQL asserted that the controversy surrounding the permit was not within the "exception for cases that are 'capable of repetition yet evading review.'" ²⁹⁸ CRCQL commented by way of a footnote at the close of its brief that, because the petition became moot through PADEP's own actions, it would be inappropriate for the Court to vacate the Third Circuit decision.²⁹⁹ CRCQL offered no legal support for this contention.

The Commonwealth of Pennsylvania filed a brief in opposition that advanced three principal arguments.³⁰⁰ First, PADEP contended that CRCQL's claims were not truly moot, despite the revocation of the permit, because the complaint itself was broader than the single

²⁹⁷ See *id.* at 6 (citing *Los Angeles v. Lyons*, 461 U.S. 555, 560-61 (1983)). Regarding the standing issue, CRCQL argued that "through their own action, or at the request of SRS," PADEP afforded CRCQL the relief sought in this case and removed the injury, i.e., the permit issued by PADEP to operate the waste treatment facility in Chester. See *id.* at 6.

²⁹⁸ *Id.* at 7 (quoting *Roe v. Wade*, 410 U.S. 113, 125 (1973)). Unlike a transitory event such as a pregnancy or an election campaign, contentions around a permit will not both commence and expire before full opportunity for judicial review. Instead, if a permitting authority issues another permit that allegedly violates EPA regulations, there will be sufficient time to make a challenge. See *id.* CRCQL noted that it was only PADEP's denial of SRS's permit extension and SRS's subsequent withdrawal that brought the end to the controversy in the case before the Court. See *id.*

²⁹⁹ See Respondent's Brief at 8 n.3, *Seif* (No. 97-1620) available in 1998 WL 470120.

³⁰⁰ See Petitioner's Brief, *Seif* (No. 97-1620). On August 6, 1998, the U.S. Chamber of Commerce, National Black Chamber of Commerce, and Pennsylvania Chamber of Business and Industry filed a joint amicus brief in support of PADEP which relied more on socio-economic arguments than legal reasoning and did not address the issue of mootness. See Brief of Amicus Curiae of Chamber of Commerce of the United States of America, National Black Chamber of Commerce, Inc., and Pennsylvania Chamber of Bus. and Indus. in Support of Petitioners, *Seif* (No. 97-1620) available in 1998 WL 457676. The amici opened their joint brief by painting a picture of Chester as a city that experienced an economic decline in the post-war days of the 1950s. See *id.* at 3-4. Since the 1950s, the amici cited deteriorating home stock, a dramatic decrease in size, a four-fold increase in the African-American population, and a significantly poorer population. See *id.* at 4. However, in the 1980s, state and local governments instituted programs to improve the economy and living conditions in the city, such as implementing economic enterprise zones designed to trigger tax and financial incentives and to attract industrial facilities to areas of the city zoned for heavy industry. See *id.* at 5. The amici viewed CRCQL as opposing such efforts undertaken to restore the vitality of the community. See *id.* at 6.

The amici characterized the disparate effect allegation of the CRCQL as follows:

[CRCQL] complains neither of intentional discrimination nor of faulty environmental decision making. Instead it claims a legal right to block a duly permitted facility from safely operating in a heavily industrialized area simply because industrial facilities as a whole are not distributed throughout Delaware County in a manner that places them equidistant from people of all races.

claim levied against the SRS permit.³⁰¹ Second, PADEP asserted that CRCQL belatedly advanced an argument of mootness “on the eve of filing . . . briefs” after months of representing that a live controversy existed, solely in an attempt to evade review of the Supreme Court.³⁰² Third, PADEP argued in the alternative, that if the Court should find

Id. at 8. The amici argued that CRCQL, and the environmental justice movement as a whole, reject the view that minority and low-income communities need jobs, tax revenues, and the government incentive programs (such as empowerment zones, enterprise communities, and brownfields) that encourage businesses to come to disadvantaged minority communities. *See id.*

The amici contended that, while claiming to benefit communities, environmental justice advocates seek to ban permanently the siting of industries and destroy predictability in the siting and permitting process. *See id.* at 8–9. In actuality, environmental justice claims drive business away from the communities that need it most. *See id.* at 9. Consequently, the amici asked that the Third Circuit decision in *Chester* be reversed. *See id.* at 29.

³⁰¹ *See* Petitioner’s Brief at 2, *Seif* (No. 97–1620). Arguing against mootness, PADEP cited CRCQL’s complaint extensively and asserted that CRCQL had actually challenged numerous permitted facilities in Chester, and had asked for not only recession of the SRS permit, but a permit review program and a revision of PADEP’s permitting criteria. *See id.* at 2–5.

³⁰² *See id.* at 9–11. Mr. Balter indicated that there is some validity to this claim. *See* Balter, *supra* note 210. Initially, CRCQL expressed an intent to go forward and argue the case on the merits despite the PADEP’s revocation of SRS’s permit. *See id.* However, CRCQL also feared that the Supreme Court had an interest in eliminating private enforcement of regulations that did not require proof of intent. *See* Letter from Jerome Balter, Director, Environmental Law Project, to Julia B.L. Worsham (June 9, 1999) (on file with author). Then, on June 22, 1998, the Supreme Court issued *Gebser v. Lago Vista Independent School District*, 118 S. Ct. 1989 (1998), an opinion that made up CRCQL’s mind. *See id.* In *Gebser*, a Title IX case in which a student sought monetary damages from a school district for a teacher’s sexual harassment and assault, the Court discussed *Guardians*. *See Gebser*, 118 S. Ct. at 1998 (citing *Guardians*, 463 U.S. at 598). Justice O’Connor considered the fact that the school district had no actual notice of the incident and stated that “the relief in an action under Title VI alleging unintentional discrimination should be prospective only, because where discrimination is unintentional, ‘it is surely not obvious that the grantee was aware that it was administering the program in violation of the [condition].’” *See Gebser*, 118 S. Ct. at 1998 (quoting *Guardians*, 463 U.S. at 598). Mr. Balter construed Justice O’Connor’s dicta in *Gebser* to indicate that she understood *Guardians* as “approving private rights of action to enforce administrative effects regulations pursuant to Section 602, 42 U.S.C. 2000d-1. This was particularly important because Justice O’Connor, in *Guardians*, was strongly opposed to private rights of action under Section 602.” Letter from Jerome Balter, Director, Environmental Law Project, to Julia B.L. Worsham (June 9, 1999) (on file with author). Justice O’Connor’s disposition in *Gebser*, along with the fact that he saw no split in the circuits, made Mr. Balter wary of the Court’s grant of certiorari for *Chester* in early June. *See* Balter, *supra* note 210. CRCQL ultimately decided that it would prefer that the Supreme Court first construe private rights of action under Section 602 in respect to a different area of law, such as one effecting children’s education or women’s rights. *See* Letter from Jerome Balter, Director, Environmental Law Project, to Julia B.L. Worsham (June 9, 1999) (on file with author). CRCQL, thus, decided to argue for mootness, avoiding review of the favorable Third Circuit decision. *See* Balter, *supra* note 210. CRCQL, however, asserted that the decision below should not be vacated. *See id.*

that the issue has been rendered moot, then justice requires that the Court vacate the judgment below and remand the case with direction to the district court to dismiss.³⁰³

In addition to its substantive legal arguments, PADEP emphasized that "events beyond the control of [PADEP] intervened to render moot those issues directly related to the SRS permit and plan approval."³⁰⁴ PADEP requested SRS's bond payment in compliance with its duties to enforce environmental laws, and stated SRS's decision to withdraw its permit was made unilaterally.³⁰⁵ Quoting *United States v. Munsingwear, Inc.*,³⁰⁶ PADEP asserted that review of the Third Circuit's decision was "prevented through happenstance," and the court of appeal's decision must be vacated.³⁰⁷

The Supreme Court ultimately embraced PADEP's argument of mootness and cited *Munsingwear* in its August 17, 1998, one sentence summary order vacating the Third Circuit decision and remanding for dismissal.³⁰⁸ As a result, no federal court decision remains on the books allowing a private right of action for allegations of disparate effect against federally funded permitting agencies under Title VI. Additionally, judicial decisions currently offer little guidance as to the methodology and standards that might apply in disparate impact claims for discriminatory facility siting. The remainder of this paper

³⁰³ See Petitioner's Brief at 11, *Seif* (No. 97-1620). PADEP asserted the general rule of *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), that "when a civil case becomes moot pending appellate jurisdiction, 'the established practice . . . in the federal system . . . is to reverse or vacate the judgment below and remand with a direction to dismiss.'" *Id.* at 12 (quoting *Munsingwear*, 340 U.S. at 39)). The rationale behind this tenet is that vacatur "clears the path for future relitigation" by removing a judgment that the unsuccessful party was unable to challenge on the merits. See *id.* (quoting *Munsingwear*, 340 U.S. at 40). PADEP reasoned that, if the present controversy was deemed moot, PADEP would have no way to oppose on direct review the position of the Third Circuit. See *id.* at 12-13. In the interests of justice, PADEP asserted that it should not be left adversely affected without further recourse. See *id.* at 13. PADEP argued that vacating a judgment that becomes moot while pending appellate review serves the purpose of returning the parties' legal relationship to its state before the suit was instituted. See *id.* Thus, "the rights of all the parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary." See *id.* (quoting *Munsingwear*, 340 U.S. at 40).

³⁰⁴ *Id.* at 15.

³⁰⁵ See *id.*

³⁰⁶ 340 U.S. 36 (1950); see *supra* note 303 and accompanying text.

³⁰⁷ Petitioner's Brief at 15, *Seif* (No. 97-1620) (quoting *Munsingwear*, 340 U.S. at 40). PADEP concluded by cautioning the Court that to render the issue moot without vacating would "yield the absurd result that a state regulatory agency must stop advising regulated entities of the requirements of the law [i.e., requesting bond payment] for fear that the entity may elect not to proceed with a project and thus moot a related case." *Id.* at 16.

³⁰⁸ See *Chester*, 119 S. Ct. at 22-23 (citing *Munsingwear*, 340 U.S. at 36).

focuses on what precedent exists regarding Title VI's disparate impact litigation procedures and standards, and considers what outstanding questions will have to be addressed in the event that courts recognize this cause of action.

IV. THE PARAMETERS, EFFICACY, AND UNANSWERED QUESTIONS OF PRIVATE DISPARATE IMPACT LITIGATION UNDER TITLE VI

Observers of developments in environmental justice predict that "[t]he litigation will continue because of all the ambiguity in the guidance and the environmental justice regulations. The questions that were raised in the *Chester* case are still out there [T]hose court proceedings will not disappear."³⁰⁹ Given the many substantive and procedural problems with EPA's Title VI regulations, future private litigation for discriminatory permitting claims is inevitable.³¹⁰ Not only will courts have to determine whether they will recognize such claims, but, if they do, courts and litigants alike will have many subse-

³⁰⁹ Mary Greczyn, *supra* note 150 (quoting Eric Bock, Washington attorney).

³¹⁰ See Mank, *Private Cause of Action*, *supra* note 66, at 60. Professor Mank cites several Title VI decisions in cases brought after the Supreme Court's vacatur of the Third Circuit *Chester* decision where plaintiffs alleged disparate racial impact in both environmental justice and other contexts:

Powell v. Ridge, 1998 WL [804727] (E.D. Pa. 1998) (Slip Copy) (citing *Chester* for proposition that Section 602 of Title VI creates private right of action without mentioning Supreme Court's vacatur of decision); Cureton v. National Collegiate Athletic Ass'n, 1998 WL § 1726653 (E.D. Pa. 1998) (denying defendant's motion to amend order to certify question for immediate appeal because Supreme Court's granting of certiorari in *Chester* did not raise substantial doubts about numerous circuit decisions recognizing private rights of action because one can only speculate about how Court would have decided case if it had not vacated the Third Circuit's judgment); The South Bronx Coalition for Clean Air, Inc. v. Conroy, 20 F. Supp. 2d 565, 572 (S.D.N.Y. 1998) (observing that it is uncertain whether private right of action exists under section 602 after Supreme Court vacated *Chester* and dismissing claim because plaintiffs['] allegations are insufficient to establish a prima facie case of disparate impact under Title VI)

Id. at 60 n.347.

Upon appeal, the Third Circuit in *Powell v. Ridge*, followed its *Chester* decision and again affirmed a private right of action for enforcement of agency (Department of Education) disparate impact regulations under Title VI. See 189 F.3d 387, 400 (3d Cir. 1999). The Supreme Court denied certiorari of the *Powell* decision. Ryan v. Powell, 120 S. Ct. 579 (U.S. 1999) (No. 99-527); Ridge v. Powell, 120 S. Ct. 579 (U.S. 1999) (No. 99-574).

quent considerations. Standing,³¹¹ causation,³¹² and available remedies³¹³ are among these unresolved questions.

A. Standing

The question of who has standing to sue under Title VI is actually an issue of discerning the "breadth of the statute's prohibition on discrimination."³¹⁴ How courts determine this parameter, however, is not settled.³¹⁵ Courts have applied four different standards in deciding whether a plaintiff may bring a private action under Title VI: (1) whether the plaintiff is the "intended beneficiary" of the federal funds in question;³¹⁶ (2) whether the discrimination inflicted on the plaintiff will harm the intended beneficiaries of the statute;³¹⁷ (3) "whether the plaintiff can show actual harm attributed to an allegedly illegal act committed by the administrators of a federally-funded program which could be remedied by a federal court";³¹⁸ and (4) whether the plaintiff's interests fall within the zone of interests that Title VI is designed to protect, i.e., a person being discriminated in the administration of a federally funded program.³¹⁹ Additionally, to have standing to request injunctive relief (but not monetary damages), community organizations representing impacted residents must show that they meet three requirements: (1) the members would have standing to bring suit individually; (2) the interests that the group acts to protect are germane to the purpose of the group; and (3) the claim asserted or

³¹¹ See Colopy, *supra* note 66, at 166.

³¹² See generally Balter, *supra* note 210.

³¹³ See Colopy, *supra* note 66, at 165.

³¹⁴ Fisher, *supra* note 2, at 317.

³¹⁵ See Colopy, *supra* note 66, at 166.

³¹⁶ See *id.* (citing *Scelsa v. City Univ. of New York*, 806 F. Supp. 1126, 1140 (S.D.N.Y. 1992); *Wrenn v. Kansas*, 561 F. Supp. 1216, 1221 (D. Kan. 1983); *Coalition of Bedford-Stuyvesant Block v. Cuomo*, 651 F. Supp. 1202, 1208 n.2 (E.D.N.Y. 1987)); see also Fisher, *supra* note 2, at 317 (citing *Laramore v. Illinois Sports Facilities Auth.*, 722 F. Supp. 443, 451-52 (N.D. Ill. 1989)).

³¹⁷ See Colopy, *supra* note 66, at 166 (citing *Coalition of Bedford-Stuyvesant*, 651 F. Supp. at 1208 n.2).

³¹⁸ *Id.* at 166-67 (citing *Coalition of Concerned Citizens Against I-670 v. Damian*, 608 F. Supp. 110, 120 (S.D. Ohio 1984); *Shannon v. United States Dep't of Hous. & Urban Dev.*, 436 F.2d 908, 918 (3d Cir. 1970)).

³¹⁹ See *Bryant v. New Jersey Dep't of Transp.*, 998 F. Supp. 438, 445-46 (D.N.J. 1998) [hereinafter *Bryant II*].

the relief requested necessitates the involvement of individual group members in the suit.³²⁰

One commentator has asserted that application of the "intended beneficiary doctrine" (IBD), which is central to the first and second standing theories used by courts, is inconsistent with the logic of the Civil Rights Restoration Act of 1987 (1987 Act)³²¹ and, therefore, the pre-1987 case law that employed the doctrine should no longer be followed.³²² The 1987 Act replaced the narrow IBD that the Supreme Court had applied to Title IX in *Grove City College v. Bell*,³²³ a 1984 decision in which the court held that "federal funds received by a subunit of an educational institution did not subject the entire institution to the non-discriminatory demands of the statute."³²⁴ *Grove City* had applied to Title VI cases as well as Title IX cases because courts looked to these statutes' precedents interchangeably when interpreting civil rights jurisprudence.³²⁵

The 1987 Act legislatively overruled *Grove City* by broadly defining "program or activity" and expanding the "applicability of Title VI's non-discrimination duty to include subunits of federally funded institutions that do not themselves receive federal aid."³²⁶ By expanding Title VI's reach to all sectors of a funded institution, Congress brought participants in those subunits, who were by definition not intended beneficiaries of the federal aid, under the protection of the Act.³²⁷ Thus, the 1987 Act arguably made application of the IBD under Title VI inappropriate.³²⁸

In 1998, the Supreme Court clarified the confusion surrounding the IBD with its decision in *National Credit Union Administration v. First National Bank & Trust Co.*, in which the plaintiff sought to challenge a

³²⁰ See Colopy, *supra* note 66, at 167 (citing *Neighborhood Action Coalition v. City of Canton*, 882 F.2d 1012, 1017 (6th Cir. 1989); *International Union, Int'l Auto., Aerospace & Agric. Implement Workers of Am. v. Brock*, 477 U.S. 274, 282 (1986)).

³²¹ Pub. L. No. 100-259, 102 Stat. 28 (1988) (Title VI provisions codified at 42 U.S.C. § 2000d-4a and 20 U.S.C. § 1687 (1988)). See Fisher, *supra* note 2, at 317-18.

³²² See Fisher, *supra* note 2, at 318.

³²³ 465 U.S. 555 (1984).

³²⁴ Fisher, *supra* note 2, at 318.

³²⁵ See Fisher, *supra* note 2, at 318 (citing, by way of example, *United States v. Alabama*, 828 F.2d 1532, 1548 (11th Cir. 1987) (per curiam)).

³²⁶ Fisher, *supra* note 2, at 318 (quoting Sonn, *supra* note 322, at 1590-91). The 1987 Act specifically broadened the prohibition of discrimination on an "institution-wide" basis to "all of the operations" of the fund recipient. See Civil Rights Restoration Act of 1987, Pub. L. No. 100-259 § 6, 102 Stat. 31 (1988) (codified at 42 U.S.C. § 2000d-4a (1988)); see also Fisher, *supra* note 2, at 318.

³²⁷ See Fisher, *supra* note 2, at 318.

³²⁸ See *id.*

National Credit Union Administration decision under the Administrative Procedure Act (APA).³²⁹ The Supreme Court held in *National Credit Union* that standing does not require an indication of congressional intent to benefit the plaintiff.³³⁰ Rather, the proper test is “whether the interest sought to be protected by the complainant is arguably within the zone of interest to be protected . . . by the statute. Hence, . . . we do not ask whether, in enacting the statutory provision at issue, Congress specifically intended to benefit the plaintiff.”³³¹ Instead, to determine standing, a court must first “discern the interests arguably to be protected by the statutory provision at issue; . . . [and] then inquire whether the plaintiff’s interests affected by the agency action are among them.”³³²

Since *National Credit Union* was decided, there has been only one Title VI district court case that specifically applied the *National Credit Union* holding to standing.³³³ In *Bryant v. New Jersey Department of Transportation*,³³⁴ the district court applied the *National Credit Union* test to determine whether residents of a minority community alleging harm from a construction project that would result in condemnation of their homes had standing to sue for disparate impact under Title VI.³³⁵ The *Bryant* court found that, “[t]he interests arguably to be protected by Title VI, then, are those of persons against whom federally funded programs discriminate.”³³⁶ If other courts follow this reasoning, standing would likely not be an obstacle because plaintiffs would necessarily allege a discriminatory impact in facility siting cases brought under EPA’s Title VI regulations.

Even if courts persist in adhering to precedent from the 1980s and apply the IBD to Title VI cases, many facility siting suits brought under Title VI will likely not be adversely affected.³³⁷ In facility siting claims, the defendant federal aid recipient is the local permitting authority itself whose permitting programs are arguably intended to

³²⁹ 522 U.S. 479 (1998).

³³⁰ See *id.* at 492.

³³¹ *Id.* (quotations and citations omitted) (emphasis altered).

³³² *Id.* (quotations omitted) (alterations added).

³³³ See *Bryant II*, 998 F. Supp. 438 (D.N.J. 1998).

³³⁴ *Id.*

³³⁵ See *id.* at 440.

³³⁶ *Id.* at 445. In *Sandoval v. Hagan*, another Title VI case decided after *National Credit Union*, the court avoided addressing the *National Credit Union* standard by finding that the plaintiff was an intended beneficiary of the contract between the federal fund recipient and the federal government. See 7 F. Supp. 2d 1234, 1263–67 (M.D. Ala. 1998), *aff’d*, 197 F.3d 484 (11th Cir. 1999).

³³⁷ See Fisher, *supra* note 2, at 319.

benefit all residents in the jurisdiction.³³⁸ In such situations, if courts apply the IBD, there is a possibility that it will not be a bar.³³⁹ This argument, however, does not always achieve the predicted result as courts do not always find community plaintiffs to be the intended beneficiaries of the local federally funded program.³⁴⁰ In a permitting context, where the challenged permitting authority arguably benefits the entire population of a municipality, or even a state, courts may find that the nexus between the challenged permitting program and the plaintiffs is too attenuated to provide a basis for standing under the IBD.³⁴¹

While the case law is not yet settled on the issue, if courts recognize a private cause of action under EPA's Title VI regulations, it seems likely that standing will not present a significant barrier to a community plaintiff in light of the *National Credit Union* decision. The recent test set forth by the Court in that case appears to allow standing under Title VI for those individuals against whom a federally funded program has allegedly discriminated.³⁴² This broad notion of standing potentially overrules the intended beneficiary doctrine of the 1980s³⁴³ and is poised to replace the variety of doctrines previously applied in Title VI litigation.

³³⁸ See *id.*

³³⁹ See, e.g., *id.*; *Sandoval*, 7 F. Supp. 2d at 1263–64 (finding that Title VI relationships are basically contractual and, therefore, the plaintiffs could bring an action as third-party beneficiaries of the contracts between the federal government and the fund recipient, the Alabama Department of Public Safety).

³⁴⁰ See, e.g., *Bryant v. New Jersey Dep't of Trans.*, 987 F. Supp. 343 (D.N.J. 1998) [hereinafter *Bryant I*]. In *Bryant I*, the plaintiffs, neighborhood groups in Atlantic City communities, argued that they were intended beneficiaries of a disputed highway extension and tunnel because the intended beneficiaries of the project included "all the citizens of the State of New Jersey and more particularly citizens of Atlantic City." *Id.* at 352 (quoting Plaintiffs' Opposition at 21). The court disagreed and found that the plaintiffs were not intended beneficiaries of the project because, "[t]o the extent that potential casino patrons, residents of Atlantic City or resident [sic] of New Jersey would benefit from this project . . . the logical nexus with the relevant program is too diffuse [sic] to provide a basis for standing and thus for subject matter jurisdiction." *Id.* The same argument could logically be made in regard to a large waste transfer station or similar facility.

³⁴¹ See *id.*; *supra* note 340.

³⁴² See *supra* text accompanying notes 329–32.

³⁴³ See *supra* text accompanying notes 326–27.

B. Exploring the Procedure and Standards of a Title VI Lawsuit

1. The Burden of Proof

While the standing requirement for a private, disparate impact suit under Title VI presents its own confusions, the contours of burdens of proof and causation for this cause of action are perhaps even more problematic. Title VI does not prohibit the government from funding all programs that have a disparate racial impact on a community, only those projects where the disparate impacts are unjustified.³⁴⁴ One commentator has identified two frequently cited Title VI cases, the 1981 Third Circuit decision of *NAACP v. Medical Center, Inc.*³⁴⁵ and the 1984 Southern District of Ohio decision of *Coalition of Concerned Citizens Against I-670 v. Damian*,³⁴⁶ as clearly outlining the burdens that parties must meet in disparate impact litigation.³⁴⁷ However, the same commentator observes that the Civil Rights Act of 1991³⁴⁸ (1991 Act), which addressed Title VII, sets higher burdens on both plaintiff and defendant.³⁴⁹ Congress and the courts have used

³⁴⁴ See *Coalition of Concerned Citizens Against I-670 v. Damian*, 608 F. Supp. 110, 127 (S.D. Ohio 1984) (stating that "Defendants are not *per se* prohibited from locating a highway where it will have differential impacts upon minorities. Rather, Title VI prohibits taking actions with differential impacts without adequate justification."); *NAACP v. Medical Ctr., Inc.*, 657 F.2d 1322, 1334 (3d Cir. 1981) (stating that "A showing of disproportionate effect or impact alone may not establish a violation To be proscribed, then, the challenged practice must not only affect disproportionately, it must do so unnecessarily."); *Colopy*, *supra* note 66, at 160.

³⁴⁵ 657 F.2d at 1331-37; see *Colopy*, *supra* note 66, at 161.

³⁴⁶ 608 F. Supp. at 146; see *Colopy*, *supra* note 66, at 161.

³⁴⁷ See *Colopy*, *supra* note 66, at 160-64.

³⁴⁸ Pub. L. No. 102-166, § 105(a), 105 Stat. 1071, 1074 (codified at 42 U.S.C. § 2000e-2(k) (Supp. 1991)).

³⁴⁹ See *Colopy*, *supra* note 66, at 163 & nn.170-71. Congress enacted the Civil Rights Act of 1991 (1991 Act) to strengthen Title VII disparate impact protections in response to the Supreme Court's weakening of those protections in *Wards Cove Packing v. Antonio*, 490 U.S. 642, 657 (1989). See *id.* at 163 nn.170-71; see also *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1407 n.14 (11th Cir. 1993). Congress and the courts have used Title VII as a model for other civil rights legislation, so the 1991 Act could affect the way courts interpret Title VI protections. See *Colopy*, *supra* note 66, at 160-62 nn.158, 163; see also *Elston*, 997 F.2d at 1407 n.14. *Colopy* cites by way of example:

Bryan v. Koch, 627 F.2d 612, 619 (2d Cir. 1980) ("The consideration of alternatives that has occurred in Title VII cases is instructive as to the appropriate standard for challenges under Title VI."); *Larry P. v. Riles*, 793 F.2d 969[, 982] n.9 (9th Cir. 1984) (approving use of Title VII's three-part analysis in Title VI disparate impact cases); *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985) (elements of disparate impact analysis "gleaned by reference" to Title VII case law).

Title VII as a model for other civil rights legislation, so the 1991 Act could affect the way courts interpret Title VI protections.³⁵⁰ The procedure for finding disparate impact in facility siting challenges is untested and it is currently unclear whether the pre-act case law or the 1991 Act controls litigation under Title VI. Because many courts use Title VII jurisprudence to interpret Title VI, however, courts will likely follow the standards of the 1991 Act.³⁵¹

Specifically addressing the plaintiff's burden of proof, if the 1991 Act is not adopted, *Medical Center, Inc.* and *Concerned Citizens* indicate that the plaintiff must first present a prima facie case showing a "definite and measurable" disparate impact on the community in question.³⁵² To establish the prima facie case for discriminatory effect, plaintiffs only need to show statistical disparities that are sufficiently substantial to raise an inference of causation.³⁵³ In contrast, under the 1991 Act, the plaintiff must demonstrate that a particular practice of the defendant causes a disparate impact based on race,³⁵⁴ unless the court determines that each of the defendant's allegedly discriminatory acts cannot be separated from the other.³⁵⁵ Because a plaintiff usually must isolate particular practices of the defendant, the standard of the 1991 Act for the plaintiff's prima facie case is actually more rigorous than that required by *Medical Center, Inc.* and *Concerned Citizens*.

Under *Medical Center, Inc.* and *Concerned Citizens*, after the plaintiff has established a prima facie case the defendant has the burden of producing evidence that shows "a legitimate, nondiscriminatory rea-

Colopy, *supra* note 66, at 160 n.158. The procedural mechanism for burden of proof and production outlined in the 1991 Act should be used as the Title VI standard because it is appropriate that the regulation of public spending (Title VI) be at least as rigorous as the regulation of private employment practices (Title VII). *See id.* at 163 n.178.

³⁵⁰ *See* Colopy, *supra* note 66, at 160-62 nn.158, 163; *see also* *Elston*, 997 F.2d at 1407 n.14.

³⁵¹ *See supra* note 349.

³⁵² Colopy, *supra* note 66, at 161 (citing *Medical Ctr., Inc.*, 657 F.2d at 1332; *Georgia State Conference*, 775 F.2d at 1417; *Coalition of Concerned Citizens*, 608 F. Supp. at 127).

³⁵³ *See id.* at 161 n.161 (citing *Medical Ctr., Inc.*, 657 F.2d at 1334; *Scelsa v. City Univ. of New York*, 806 F. Supp. 1126, 1141 (S.D.N.Y. 1992)).

³⁵⁴ *See id.* at 163 (citing 42 U.S.C. § 2000e-2(k)(1)(A)(i) (Supp. 1991)). Under this formulation, the plaintiff can not simply point to the resultant statistical disparities to evidence discrimination; rather, the plaintiff must show that each element in the defendant's overall decisionmaking is discriminatory, unless those elements are incapable of being separated. *See id.* at 163 n.173 (citing 42 U.S.C. § 2000e-2(k)(1)(B)(i) (Supp. 1991)).

³⁵⁵ *See supra* note 354.

son for its action,"³⁵⁶ i.e., that the discriminatory decision was a business necessity.³⁵⁷ If the defendant does not meet this burden of production, the court, in its discretion, may assume that the defendant did not have a permissible reason for creating the disparate impact.³⁵⁸ However, if the defendant presents evidence that the discriminatory practice was caused by a business necessity, then the burden shifts to the plaintiff to show that the defendant's justification is actually a pretext for discrimination,³⁵⁹ or that the defendant could use other selection procedures that would have a less discriminatory impact, but would still serve the defendant's legitimate interests.³⁶⁰

In contrast, under the 1991 Act, once the plaintiff establishes a prima facie case of disparate impact, the ultimate burden of *persuasion*, not production, shifts to the defendant.³⁶¹ To meet this burden, the defendant must "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."³⁶² Even if the defendant successfully proves business necessity, the plaintiff is afforded an opportunity to present evidence that "other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient

³⁵⁶ *Medical Ctr., Inc.*, 657 F.2d at 1333; *Coalition of Concerned Citizens*, 608 F. Supp. at 127; see also Colopy, *supra* note 66, at 161. "It is important to note [under Title VI case law] that while the burden of going forward with evidence shifts from the plaintiff to the defendant, the ultimate burden of persuasion may remain with the plaintiff." *Id.* at 161 n.163 (citing *Medical Ctr., Inc.*, 657 F.2d at 1334). But see *supra* note 349.

³⁵⁷ See Colopy, *supra* note 66, at 161-62 (citing *Georgia State Conference*, 775 F.2d at 1417).

³⁵⁸ See *id.* at 162 (citing *Medical Ctr., Inc.*, 657 F.2d at 1334).

³⁵⁹ See *id.* (citing *Medical Ctr., Inc.*, 657 F.2d at 1334).

³⁶⁰ See *id.* (citing *Medical Ctr., Inc.*, 657 F.2d at 1336).

³⁶¹ See *id.* at 164 (citing *Georgia State Conference*, 775 F.2d at 1417); see also Fisher, *supra* note 2, at 321. Colopy cites *Georgia State Conference of Branches of NAACP*, 775 F.2d at 1417 because:

the Title VI disparate impact scheme laid out in *Georgia State Conference* was derived from Title VII standards. In *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989), the Supreme Court altered the Title VII disparate impact scheme by shifting the burden of persuasion on the second justification prong from the defendant to the plaintiff. In the Civil Rights Act of 1991, Congress responded to this aspect of *Wards Cove* by returning the burden of persuasion with respect to justification to the defendant.

Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1407 n.14 (11th Cir. 1993) (citations omitted). Thus, *Georgia State Conference* properly represents the standard of proof under the 1991 Act.

³⁶² 42 U.S.C. § 2000e-2(k)(1)(A)(i) (Supp. 1991). See Colopy, *supra* note 66, at 163-64. Clearly the 1991 Act's "business necessity defense" would need to be adapted to fit Title VI, rather than Title VII, litigation. See *id.* at 164 n.174.

and trustworthy workmanship.”³⁶³ Although it is more difficult for the plaintiff to establish a *prima facie* case under the 1991 Act than under *Medical Center, Inc. and Concerned Citizens*,³⁶⁴ this shifting of the burden of persuasion from the plaintiff to the defendant makes litigation under the 1991 Act less onerous for plaintiffs.³⁶⁵

Although no legislation or Supreme Court decision is yet on point, the limited body of recent Title VI case law indicates that courts are adopting the distribution of proofs set forth in the 1991 Act.³⁶⁶ It seems likely that courts will continue to follow this practice³⁶⁷ because it is well established that “[i]n deciding Title VI disparate impact claims [courts] borrow from standards formulated in Title VII disparate impact cases.”³⁶⁸

2. The Elements of the *Prima Facie* Case: “Disparity” and “Impact”

Under both Title VI case law and the 1991 Act, the plaintiff must show a disparate impact based on race to establish a *prima facie* case.³⁶⁹ There is, however, no controlling authority as to what constitutes either “disparity” or “impact” in a Title VI siting case. Therefore, plaintiffs may seek to rely on other Title VI cases for indicators regarding how courts may proceed on these elements of the *prima facie* case.

³⁶³ *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975); see Colopy, *supra* note 66, at 164. The defendant must have been afforded the opportunity to adopt the plaintiff’s proposals for alternative practices and must have refused to do so. See 42 U.S.C. § 2000e-(k) (1) (A) (ii); see also Colopy, *supra* note 66, at 164 n.177.

³⁶⁴ See *supra* text accompanying notes 352–55.

³⁶⁵ See Fisher, *supra* note 2, at 321; see also Watson, *supra* note 349, at 971–75; *Elston*, 997 F.2d at 1407 n.14 (referring to the distribution of burdens articulated in *Georgia State Conference* [mirrored in the 1991 Act] as a “more relaxed standard” than that articulated in prior case law).

³⁶⁶ See, e.g., *Sandoval v. Hagan*, 7 F. Supp. 2d 1234, 1278 (M.D. Ala. 1998) (following distribution of burdens indicated in *Georgia State Conference*); *Association of Mexican-American Educators v. California*, 937 F. Supp. 1397, 1399 n.3 (N.D. Cal. 1996) (stating that “[c]ourts have generally applied the standards applicable to disparate impact cases under Title VII to disparate impact cases arising under Title VI.”). But see *African American Legal Defense Fund, Inc. v. New York State Dep’t of Educ.*, 8 F. Supp. 2d 330 (S.D.N.Y. 1998). In *African American Legal Defense Fund*, although the court indicated that the “analytical framework for disparate impact cases under Title VI regulations is the same as that for Title VII cases,” the court ignored the scheme of the 1991 Act and declared that the burden of persuasion remains on the plaintiff. *Id.* at 338 n.12 (citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981)).

³⁶⁷ See Fisher, *supra* note 2, at 321.

³⁶⁸ *Elston*, 997 F.2d at 1407 n.14.

³⁶⁹ See *supra* text accompanying notes 352–55.

One of the first issues that plaintiffs must face when building a *prima facie* case is what will be measured and compared in the disparity analysis: "disparate as compared to what?"³⁷⁰ The small universe of Title VI litigation appears to indicate that, when courts determine disparity, it is appropriate to measure the racial proportionality of the allegedly affected population against the population of the defendant entity's decisionmaking jurisdiction.³⁷¹ Although this formulation appears simple, it may present analytical and pragmatic problems to litigants and courts alike.

First, courts and litigants will need to establish what the phrase "on the ground of race"³⁷² means in Title VI litigation as it relates to facility siting.³⁷³ Taken to the extreme, this language could allow courts to find a "disparate impact based on race" where a facility is cited in a predominantly white enclave within a larger ethnic-minority community. To avoid this anomaly, courts could use the EPA's terminology "minority population," which includes ethnic categories defined by the U.S. Bureau of the Census and the UC.³⁷⁴ "Blacks, Hispanics, Asian/Pacific Islanders, American Indians, Alaskan Natives and other non-caucasian persons" are covered within that definition.³⁷⁵ This categorization of "minority," however, may present difficulties. For example, what is the level at which "a given group of minorities would be sufficiently large to form a minority population or minority community?"³⁷⁶ How should courts approach a complaint

³⁷⁰ Fisher, *supra* note 2, at 322.

³⁷¹ See, e.g., Villanueva v. Carere, 85 F.3d 481, 487 (10th Cir. 1996) (comparing the percentage of Hispanic students enrolled at an experimental school with the percentage of Hispanic students in the school district); Larry P. v. Riles, 793 F.2d 969, 983 (9th Cir. 1984) (comparing the percentage of black students in the state school system's "educable mentally retarded" population with the percentage of black students in the state school population); Fisher, *supra* note 2, at 322 (stating that a "challenge to the administration of a state enforcement scheme would necessitate a comparison of enforcement in the plaintiff's community with state-wide enforcement. . . . [But] if the target of the suit is a facility sited by a county land-use board . . . then that county would be the universe for statistical analysis."). But see Coalition of Concerned Citizens Against I-670 v. Damian, 608 F. Supp. 110, 127-28 (S.D. Ohio 1984) (finding racially disparate impact not based on comparisons of population pools, but solely on statistical data regarding the affected population).

³⁷² 42 U.S.C.A. § 2000d (1999). See, e.g., *supra* note 32 (discussing classification of "Hispanics" as non-minorities in Yandle study).

³⁷³ See Gunn, *supra* note 32, at 1236.

³⁷⁴ See *id.* (citing UC STUDY, *supra* note 20, at 2; EPA EQUITY REPORT, *supra* note 25, at 9; Anthony R. Chase, *Assessing and Addressing Problems Posed By Environmental Racism*, 45 RUTGERS L. REV. 335, 338 (1993)).

³⁷⁵ See *id.* (quoting EPA EQUITY REPORT, *supra* note 25, at 9).

³⁷⁶ *Id.*

from a community that is predominantly comprised of “ethnic minorities,” by definition, but that is located within a state that consists of an ethnic blend such that no ethnic group comprises more than fifty percent of the population?³⁷⁷

Second, in addition to racial composition, courts and litigants must consider geography in identifying the “affected population.”³⁷⁸ Here, the time, expense, and effort in gathering statistical data often force Title VI plaintiffs into relying on existing boundary lines whose demographics are already known.³⁷⁹ Plaintiffs frequently call the census tract, county, or zip code sector in which the facility is to be built the affected area.³⁸⁰ The size and geographical structure of these pre-ordained zones, however, may bear little or no relationship to the area actually affected by the challenged facility.³⁸¹ In some cases, if the census tract relied upon is larger than the affected area, then non-impacted residents will be improperly folded into the statistical data.³⁸² Similarly, using a census tract will not allow for measuring degree of impact since the impact upon those closest to a facility within a given tract will be equated to those living at the edge of the tract.³⁸³ Further, because pre-ordained boundaries may not correlate to the actual area affected, those who live near the facility, but across the selected boundary, will not be counted.³⁸⁴ Lastly, such boundaries do not account for contingencies such as being down-wind or down-stream from the facility.

Additionally, courts may find that merely comparing the affected population with the population of the agency’s jurisdiction is too simplistic and may be uncomfortable with relying on a formula not devised to address environmental impacts. Courts may instead elect to build their nascent formulation of disparity in siting cases on the expertise of EPA, deferring to the agency’s experience with the issues.³⁸⁵

³⁷⁷ Hawai’i and New Mexico could currently present such a situation, and Texas and California will become majority minority states within 25 years. Edwin Tanji, *Nation Headed for Ethnic Mix Like Isles*, THE HONOLULU ADVERTISER, Dec. 12, 1999, at A27.

³⁷⁸ See Fisher, *supra* note 2, at 322.

³⁷⁹ See *id.*

³⁸⁰ See *id.*

³⁸¹ See *id.* at 323.

³⁸² See *id.*

³⁸³ See Fisher, *supra* note 2, at 323.

³⁸⁴ See *id.*

³⁸⁵ In regard to courts potentially adopting EPA’s population comparison methodology, it should be noted that while EPA has processed 14 Title VI disparate impact claims since December of 1993, none of the resultant investigations concluded in findings of disparate impact. Letter Enclosure: Complaints Under Consideration or Investigation

In EPA's Shintech investigation, the agency relied on census data to determine the racial makeup of communities within one-, two-, and four-mile radii of the proposed plant location and compared these to the racial composition of the state and the other affected geographic regions.³⁸⁶ EPA conducted similar racial composition demographic analyses on communities around other facilities in the state that emitted toxic pollutants to determine the "comparative universes."³⁸⁷ "For each geographic and facility universe, the demographic analysis calculated the percentage of minority persons within the test radii, and compare[d] the results with the percentage of minority persons in the state as a whole."³⁸⁸ Although such a radial study may be optimal,³⁸⁹ if courts required plaintiffs to conduct similarly in-depth investigations and analyses to establish a prima facie case of disparity, private action under Title VI would be prohibitively expensive for community groups.³⁹⁰

from Dan J. Rondeau, Director, U.S. EPA Office of Civil Rights, to Jerome Balter, Public Interest Law Center of Philadelphia (August 14, 1996). Given the conflict surrounding EPA's Title VI regulatory enforcement and procedures, courts may choose not to adopt EPA's constructs. See *supra* sections II.B.1-2.

³⁸⁶ See Cole & Shanklin, *supra* note 72, at Col. 1; Sive & Srolovic, *supra* note 74, at Col. 1. For the comparison geographic regions, similar facilities were assessed. See Cole & Shanklin, *supra* note 72, at Col. 1. Similarity was determined by Standard Industrial Category (SIC) code, release of similar pollutants, and varying amount of Toxic Release Inventory (TRI) releases. See *id.*

³⁸⁷ See Cole & Shanklin, *supra* note 72, at Col. 1; Sive & Srolovic, *supra* note 74, at Col. 1; see also *supra* text accompanying notes 104-10.

³⁸⁸ Cole & Shanklin, *supra* note 72, at Col. 1. EPA indicated that this analysis is not conducted to assess the health effects created by emissions. See *id.* The agency reportedly is working on such a "harm analysis," as well as an analysis regarding the results of cumulative impacts of all facilities within an affected community. See *id.*; Sive & Srolovic, *supra* note 74, at Col. 1.

³⁸⁹ See Fisher, *supra* note 2, at 324. However, drawing concentric circles around plants does not amply address concerns such as being down-wind or down-stream of a facility. Additionally, the accuracy of EPA's complex statistical methodology itself has come into question with environmental justice advocates. See Cole & Shanklin, *supra* note 72, at Col. 1. According to EPA's analysis, it is 73% more probable that an African-American will live within two miles of a TRI facility in certain studied areas of Louisiana than a member of any other racial group. See *id.* In contrast, critics of the EPA methodology have predicted that, if the population of the actual Shintech site is analyzed, rather than "comparative universes," the data will show that African-Americans have a 400-500% higher probability of living in proximity to the Shintech site than non-African-Americans. See *id.*

³⁹⁰ See Balter, *supra* note 210; see also Fisher, *supra* note 2, at 324. Fisher notes that the "problem of resource expenditure is exacerbated by a recent Supreme Court decision which disallowed experts' fees as attorney's fees recoverable by the prevailing party in a Title VI suit." *Id.* at 324 n.202 (citing *West Virginia Univ. Hosps. v. Casey*, 499 U.S. 83, 102 (1991)).

One commentator has suggested that plaintiff organizations can best address "disparity" in the *prima facie* case by using pre-ordained boundaries to identify the relevant population and necessary racial statistics, but then augment those statistical comparisons with any relevant information that helps to create a context for the court.³⁹¹ For example, a complaint should explain how the impacts of facilities outside of the identified boundary might stretch across the identified boundary line, i.e., a landfill site only miles across the county line and on top of a common water aquifer.³⁹² Additionally, the complaint might highlight any minority concentrations within a particular area of the pre-ordained zone.³⁹³ Plaintiffs also should indicate the presence of additional facilities within close proximity to the affected area's boundary line, and the existence of multiple facilities within the zone itself.³⁹⁴ The court, therefore, is able to see not only statistical racial comparisons between the community affected by the facility in question and the jurisdiction at large, but also any inequity of burdens carried by the plaintiff community as compared to the greater jurisdiction.³⁹⁵

This "kitchen sink" method of alleging disparity is helpful to plaintiffs for two reasons. First, it is efficient because it allows plaintiffs to use existing demographic data, yet it still provides a complete context for the court to consider.³⁹⁶ Second, because Title VI case law offers only general outlines for determining disparity, and courts have no precedent to follow in facility siting challenges, a plaintiff can sug-

³⁹¹ See Fisher, *supra* note 2, at 323-24.

³⁹² See *id.* (citing Letter from the Sierra Club Legal Defense Fund (SCLDF) to the U.S. Commission on Civil Rights 6 (Sept. 2, 1993) [hereinafter SCLDF Letter] (requesting an investigation of Mississippi's hazardous waste facility permitting program)).

³⁹³ See *id.* at 323 n.195.

³⁹⁴ See *id.*

³⁹⁵ See *id.* (indicating that while the State of Mississippi produces about 45,000 tons of hazardous waste a year, about 130,000 tons of hazardous waste are designated for dumping in Noxubee County and its immediate vicinity yearly); see also Plaintiffs' Complaint at 8-20, *Chester Residents Concerned for Quality Living v. Seif*, 944 F. Supp. 413 (E.D. Pa. 1996) (No. 96-3960). The *Chester* complaint includes specifics detailing the tonnage of all existing waste facilities inside the census tract "affected," the permit capacity in tons of the contested future facility, the presence and capacity of other industrial facilities in the tract, the racial composition of the tract in question, the racial composition of the residents within one-half mile and one mile of the contested facility site, the racial compositions of surrounding census tracts in the city and the absence of facilities in those areas, the racial composition of the surrounding city, the racial composition in the surrounding county, and the location of waste treatment facilities throughout the county as paired with relevant racial demographics. See *id.*

³⁹⁶ See Fisher, *supra* note 2, at 324.

gest to the court what type of evidence it should consider by providing a targeted selection of facts.³⁹⁷

In addressing "disparity," not only do courts have to determine what to compare, they also must decide at what level statistical outcomes become significant such that a finding of disparity is permissible—how much must the identified difference be? A survey of recent Title VI circuit court decisions does not reveal a suggested statistical differential upon which courts can rely in facility siting cases.³⁹⁸ The body of Title VII case law, however, is more complete and may be instructive.³⁹⁹

Under Title VII, the Supreme Court has held that statistical disparity in allegations of employment discrimination must be "sufficiently substantial" to raise an inference that the alleged discriminatory act caused the detrimental effect because of the affected group's race.⁴⁰⁰ The Court did not rely on a particular mathematical formula to indicate when a disparity is sufficiently substantial, and held that case-by-case consideration of all facts and circumstances is appropriate.⁴⁰¹ The Court additionally indicated that to establish a *prima facie* case of disparate impact, set mathematical formulas cannot determinatively indicate sufficiently substantial disparity based solely on the statistical differential.⁴⁰²

Although the Supreme Court indicated that mathematical analysis alone is not enough to create an inference of disparate impact, appellate courts have continued to use a variety of formulas to help them identify sufficiently substantial disparities. One such mathematical formula is the standard deviation analysis, which measures the probability that the difference between an actual result and a predicted result is random: the greater the number of standard deviations between the actual and predicted result, the less likely that chance alone is the cause of the disparity and the more likely that the

³⁹⁷ See Balter, *supra* note 210.

³⁹⁸ See, e.g., Villanueva v. Carere, 85 F.3d 481, 487 (10th Cir. 1996) (finding no disparate impact where school's 50% Hispanic enrollment "compared with approximately the same proportion of Hispanic students" in the entire school district); Larry P. v. Riles, 793 F.2d 969, 973 (9th Cir. 1984) (finding racial disparity where black students comprised 9% of the state school population, but 27% of the "educable mentally retarded" population, and the odds of a color-blind system resulting in such a statistic was one in a million).

³⁹⁹ See *supra* note 349.

⁴⁰⁰ See Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994-95 (1988).

⁴⁰¹ See *id.*

⁴⁰² See *id.*

disparity is caused by other factors.⁴⁰³ At least one appellate court used a "common sense" comparison of statistical ratios,⁴⁰⁴ while four appellate courts have relied on an "inexorable zero standard"—this allows a high probability of discrimination where no members of a minority group are hired despite being in an area with a sizable minority representation.⁴⁰⁵ Given the prevalence of statistical analysis in Title VII disparate action cases, it is likely that courts will consider similar evidence in Title VI facility siting cases.⁴⁰⁶ Plaintiffs, however, also will want to include as many unique "facts and circumstances" as

⁴⁰³ See *Ottaviani v. State Univ. of New York at New Paltz*, 875 F.2d 365, 372 n.7 (2d Cir. 1989) (citing M. ABRAMOWITZ & I. STEIGAN, HANDBOOK OF MATHEMATICAL FUNCTIONS (National Bureau of Standards, U.S. GPO, Applied Mathematics Series No. 55, 1966)). A finding of 2-3 standard deviations equates to a one in 384 chance that a result was random. See *id.* (citing M. ABRAMOWITZ & I. STEIGAN, HANDBOOK OF MATHEMATICAL FUNCTIONS (National Bureau of Standards, U.S. GPO, Applied Mathematics Series No. 55, 1966)). Courts have generally determined that a finding of 2-3 standard deviations can be a strong indicator of discrimination. See, e.g., *id.* at 372; *Waisome v. Port Auth. of NY & NJ*, 948 F.2d 1370, 1376 (2d Cir. 1991) (finding that 2-3 standard deviations can strongly indicate discrimination, but refusing to establish a minimum threshold for statistical significance); *Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1556 (11th Cir. 1994) (finding an inference of race based discrimination where calculated disparity was 17.6 standard deviations); *Emmanuel v. Marsh*, 897 F.2d 1435, 1443 (8th Cir. 1990) (finding that disparity of 4.9 standard deviations was statistically significant and, considering the additional evidence of past discrimination, established the plaintiffs' prima facie case); *Rendon v. AT&T Tech.*, 883 F.2d 388, 397-98 (5th Cir. 1989) (rejecting defendant's argument that disparity of 3 standard deviations must be shown and holding that finding of 2.9 standard deviations was sufficient evidence of disparity).

⁴⁰⁴ See, e.g., *Frasier v. Garrison ISD*, 980 F.2d 1514, 1526-27 (5th Cir. 1993) (finding that difference of 4.5% between rates of test passage for blacks versus whites was not sufficiently substantial). This type of analysis was widely used in the 1970s and 1980s, but *Frasier* was the only federal appellate court decision to use a "common sense" comparison of ratios since the 1988 *Watson* decision. See *id.*; see *Dothard v. Rawlinson*, 433 U.S. 321, 329-31 (1977); *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 n.6 (1971); *Bunch v. Bullard*, 795 F.2d 384, 395 (5th Cir. 1986); *Moore v. Southwestern Bell Tel., Co.*, 593 F.2d 607, 608 nn.1-2 (5th Cir. 1979); *Bushey v. New York State Civil Serv. Comm'n*, 733 F.2d 220, 225-26 (2d Cir. 1984); *Bridgeport Guardians v. Bridgeport Civil Serv. Comm'n*, 482 F.2d 1333, 1335 (2d Cir. 1973); *Craig v. City of Los Angeles*, 626 F.2d 659, 661-62 (9th Cir. 1980); *United States v. County of Fairfax*, 629 F.2d 932, 939-40 (4th Cir. 1980); *Firefighters Inst. for Racial Equality v. City of St. Louis*, 549 F.2d 506, 510 n.4 (8th Cir. 1977); *Douglas v. Hampton*, 512 F.2d 976, 982 (D.C. Cir. 1975); *Yuhas v. Libby Owens Ford Co.*, 562 F.2d 496, 498-500 (7th Cir. 1977); *Castro v. Beecher*, 459 F.2d 725, 735 (1st Cir. 1972).

⁴⁰⁵ See *EEOC v. Steamship Clerks Union Local 1066*, 48 F.3d 594, 604 (1st Cir. 1995); *NAACP v. Town of East Haven*, 70 F.3d 219, 225 (2d Cir. 1995); *EEOC v. O&G Spring Wine Farms*, 38 F.3d 872, 875 (7th Cir. 1994); *Newark Branch of NAACP v. Harrison*, 940 F.2d 792, 800 (3d Cir. 1991).

⁴⁰⁶ See *supra* note 349.

possible in making their *prima facie* case in order to assist the court in finding “sufficiently substantial” disparity.⁴⁰⁷

A plaintiff’s *prima facie* case must establish “impact” as well as disparity.⁴⁰⁸ What courts will recognize as actionable impact, however, is unclear. While neither Section 602 nor EPA regulations contains the word “adverse” in relation to the actionable “effect,” this requirement is found in Title VI⁴⁰⁹ and Title VII case law.⁴¹⁰ Findings of recent Title VI cases suggest that the adverse impact alleged can either relate to the primary focus of the challenged agency, e.g., schools and education,⁴¹¹ or may reflect social or economic concerns that flow from the agency’s decision, e.g., general discriminatory government action and stigma.⁴¹²

Such a potentially broad understanding of impact raises many questions. First, could impact be satisfied by simple physical proximity to a facility?⁴¹³ If courts adopt this practice, businesses likely will argue:

[C]laims will not be limited to waste disposal facilities or other purportedly “unclean” activities. On the contrary, they will reach “clean”—even “state of the art”—manufacturing and service facilities in all sectors of the economy. These claims will not be limited to significant or recognized health or environmental risks, but rather will address any diversity

⁴⁰⁷ See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 995 (1988).

⁴⁰⁸ See *supra* text accompanying note 369.

⁴⁰⁹ See, e.g., *Elston v. Taladega County Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993) (stating that “a plaintiff must first demonstrate that a facially neutral practice has a disproportionate adverse effect on a group protected by Title VI.”); *Young v. Montgomery County*, 922 F. Supp. 544, 549–50 (M.D. Ala. 1996) (stating that “[i]nitially, a plaintiff must show by a preponderance of the evidence that a facially neutral educational practice has a racially disproportionate adverse effect.”).

⁴¹⁰ See, e.g., *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1484–86 (9th Cir. 1993) (finding that the plaintiff must prove that the policy has adverse effects, that the impact of the policy is on a condition or privilege of employment, that the adverse effects are significant, and that the employee population in general is not affected by the policy).

⁴¹¹ See *Allen v. Wright*, 468 U.S. 737, 756–57 (1984); *Gomez v. Illinois State Bd. of Educ.*, 811 F.2d 1030, 1043 (7th Cir. 1987) (finding in a Title VI, educational context that, a tangible impact may be based upon the diminished ability of students to receive an education).

⁴¹² See *Allen*, 468 U.S. at 755; *Grimes v. Cavazos*, 786 F. Supp. 1184, 1186 (S.D.N.Y. 1992). The *Allen* court warned that stigma “is one of the most serious consequences of discriminatory government action.” See *id.*

⁴¹³ See *Fisher*, *supra* note 2, at 325.

of potential exposure to environmental risks that creative lawyers can allege.⁴¹⁴

Courts will need to address whether they will take into account the various risks caused by different types of facilities and, if so, how they will factor a showing of racial disparity into that analysis.

There is a second and related question: if proximity alone will not constitute an adverse impact, what type of "harm" must a plaintiff allege? Will a decrease in property values, a lessening of enjoyment of property, or a showing that the plaintiffs were deprived of the benefits of equitable program administration be sufficient?⁴¹⁵ Or, to show adverse impact successfully, must a plaintiff prove that the facility is likely to cause actual physical harm? In assessing harmful health effects, courts could potentially adopt EPA's reasoning in *Select Steel* to decide when an alleged impact is "adverse." Such an adoption probably would effectively limit a finding of adverse impact to situations where permits do not meet the requirements of existing environmental standards.⁴¹⁶

Finally, courts will need to decide if and how they will consider issues unique to siting concerns, such as the role of cumulative effects of multiple facilities⁴¹⁷ and existing vulnerabilities in the affected community.⁴¹⁸ Many questions will be further influenced by which

⁴¹⁴ Brief of Amicus Curiae of Chamber of Commerce of the United States of America, National Black Chamber of Commerce, Inc., and Pennsylvania Chamber of Bus. and Indus. in Support of Petitioners, *Seif* (No. 97-1620) available in 1998 WL 457676 (citing EPA EQUITY REPORT, *supra* note 25, at 11, 13) (stating that "[e]xposure is not the same as health effects [and] [t]here is a general lack of data on environmental health effects by race and income [and on the] environmental contribution to these diseases.") (alteration in Brief of Amicus Curiae Chamber of Commerce of the United States of America, National Black Chamber of Commerce, Inc., and Pennsylvania Chamber of Bus. and Indus. at 29, *Seif* (No. 97-1620)).

⁴¹⁵ See Fisher, *supra* note 2, at 325.

⁴¹⁶ See *supra* text accompanying notes 189-93, 203.

⁴¹⁷ Jerome Balter has hypothesized that, given the complexity and necessary expense of establishing causation, a cumulative impact analysis will never decide any complaint. See Balter, *supra* note 210.

⁴¹⁸ See Foster, Interview, *supra* note 136. The question here is whether plaintiffs should be held to an easier standard in establishing "adversity" or "impact" where the group in question is suffering environmentally related health effects and, therefore, is more vulnerable to chemical exposure. See *id.* For example, in June, 1995, 60% of Chester's pre-school age children exceeded the Center for Disease Control's (CDC) recommended limit of lead per deciliter of blood. See Nate House, *Westinghouse to Pay \$400,000 for Environmental Violations*, PA. TRIBUNE, June 26, 1998, at 2A. It stands to reason that the national ambient air quality standards for lead were not established with such a population in mind. What may be a safe emission level for a healthy community may very well be quite dangerous to children who are already suffering from pervasive lead poisoning. The current scheme of

event(s) will be allowed to trigger the permit challenge (issuance of the challenged permit, modification of the permit, renewal of the permit).⁴¹⁹ All of these unknowns will need to be considered by parties and answered by courts as the case law develops.

3. The Defendant's Rebuttal

If the elements of the defendant's rebuttal under Title VI⁴²⁰ case law are paired with the distribution of proofs under the 1991 Act,⁴²¹ then a permitting agency may rebut the plaintiff's prima facie case by proving that "a legitimate, nondiscriminatory reason,"⁴²² i.e., a busi-

establishing the plaintiff's prima facie case does not take into effect such variables. Courts will need to decide whether these variables should be considered, or whether this type of analysis will put judges in an improper position of second guessing existing environmental standards and will make Title VI a surrogate for environmental laws.

African American Legal Defense Fund, Inc. v. New York State Dep't of Educ., 8 F. Supp.2d 330 (S.D.N.Y. 1998), may be instructive regarding the limits that courts may place on addressing such policy considerations. In that case, a civil rights organization and the parents of Hispanic and African-American public school students challenged state legislation that required state school funds to be distributed based on student attendance rather than enrollment. *See id.* at 336. The plaintiffs alleged that the attendance-based system of fund distribution created a disparate impact on New York City minorities because of factors such as single parenting, poor housing, and poor medical programs, which contributed to student absenteeism. *See id.* at 338. In response, the court stated that "one cannot look to Title VI's regulations for remedy for any alleged disparate impact of this nature, however real and distressing." *Id.* The court reasoned that, because it was not the practices of the fund recipients (the school districts) that produced these social problems and the absenteeism, "Title VI's regulations support no action under law upon those factors." *See id.* at 339. Thus, the court appeared to be unwilling to find a disparate impact under Title VI where the differences resulted from societal factors that disproportionately impacted on minorities, but were not caused by the defendants' program policies. *See id.*

⁴¹⁹ *See supra* notes 129-30 and accompanying text.

⁴²⁰ *See supra* text accompany notes 356, 357.

⁴²¹ *See supra* text accompanying note 361.

⁴²² *NAACP v. Medical Ctr., Inc.*, 657 F.2d 1322, 1333 (3d Cir. 1981); *Coalition of Concerned Citizens Against I-670 v. Damian*, 608 F. Supp. 110, 127 (S.D. Ohio 1984); *see supra* note 356. *But see supra* note 349. One commentator questions the fairness of even imposing this level of burden upon defendants in a facility siting context. *See* Bradford C. Mank, *Environmental Justice and Discriminatory Siting: Risk Based Representation and Equitable Compensation*, 56 OHIO ST. L.J. 329, 386 (1995) [hereinafter Mank, *Equitable Compensation*]. According to Professor Mank, courts should not adopt the 1991 Civil Rights Act's expansion of Title VII protections to Title VI without explicit congressional instruction. *See id.* "Unlike job discrimination, the siting of a polluting or disposal facility brings both costs and benefits to any community." *Id.* at 332. In fact, "facilities often bring greater tax and employment benefits than harms." *Id.* at 386. Professor Mank argues that the plaintiff should therefore be required to prove the existence of statistically significant disparity and that the harms to the affected group exceed the benefits that the facility will provide to that group. *See id.*

ness necessity,⁴²³ existed for issuing the permit. Thus, the permitting agency has an opportunity to “justify” a decision that results in an otherwise impermissible disparity. In Title VI cases, courts have found that disparity can be justified by: (a) the balance of overall benefits created by the discriminatory practice;⁴²⁴ (b) a finding that the “challenged policy was necessary to meeting a goal that was legitimate, important, and integral to [the fund recipient’s] institutional mission”;⁴²⁵ or (c) the absence of a necessary resource in other locales.⁴²⁶ In the context of Title VII, the Supreme Court has defined a justifying business necessity as any practice that significantly serves the legitimate interest of the employer, but which is not necessarily essential or indispensable to the employer’s interests.⁴²⁷ Recently, district courts have concluded that the 1991 Act adapted the business necessity test to some extent and requires defendants to prove “that the challenged practice is reasonably necessary to achieve an important business objective.”⁴²⁸

⁴²³ See *Colopy*, *supra* note 66, at 161 (citing Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985)).

⁴²⁴ See, e.g., *Young v. Montgomery County Bd. of Educ.*, 922 F. Supp. 544, 551–52 (M.D. Ala. 1996) (finding that prevention of athletic recruitment from majority white high schools justified the adverse impact created by policies that required transfer students to forgo one year of athletic involvement); *New York Urban League v. New York*, 71 F.3d 1031, 1039 (2d Cir. 1995) (finding that the disparate benefit caused by subsidies provided to predominately white commuter rail users was justified by the benefits that the commuter rail system produced for the city, such as minimized road congestion, decreased pollution, increased subway and bus ridership).

⁴²⁵ *Sandoval v. Hagan*, 7 F. Supp.2d 1234, 1264 (M.D. Ala. 1998), *aff’d*, 197 F.3d 484 (11th Cir. 1999). In *Sandoval*, the district court found no substantial justification for requiring English only driver’s license examinations where alleged safety concerns did not prevent non-English speaking out of state licensees from driving, did not prevent illiterate or deaf English speakers from driving, and international highway symbols were used throughout the state. See *id.* at 1301–02. The court also found that the administrative concerns did not justify the disparate impact because the department had successfully administered foreign language exams over the past ten years and had already expended substantial resources in making accommodations for deaf and illiterate English speakers. See *id.* at 1303–05.

⁴²⁶ See *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1413–14 (11th Cir. 1993) (finding that, even if siting a new school in a majority white neighborhood increased the racial imbalance in a formerly segregated school system, the lack of adequate land in the African-American majority neighborhood justified the decision).

⁴²⁷ See *Wards Cove Packing v. Antonio*, 490 U.S. 642 (1989). Although the 1991 Act specifically overruled *Wards Cove* as to the allocation of burdens, it did not explicitly define business necessity in a manner that was inconsistent with *Wards Cove*. See 42 U.S.C. § 2000e-2(k)(1)(A)(i) (Supp. 1991). But see *infra* note 428 and accompanying text.

⁴²⁸ *Donnelly v. Rhode Island Bd. of Governors*, 929 F. Supp. 583, 593 (D. R.I. 1996); see, e.g., *EEOC v. Steamship Clerks Union Local 1066*, 48 F.3d 594, 607 (1st Cir. 1995) (finding that union’s policy of continuing family traditions was not necessary to the busi-

Based on Title VI and Title VII case law and the 1991 Act, the defendant's rebuttal in a Title VI facility permitting case could consist of evidence that siting in the minority neighborhood was reasonably necessary based on considerations that are non-discriminatory, integral, and important to the fund recipient's mission.⁴²⁹ A successful rebuttal would likely focus on the overriding benefits that will flow from the challenged placement⁴³⁰ and the lack of alternate sites.⁴³¹ In making this second argument, a defendant permitting authority could emphasize the time and money that has already been expended towards facility construction.⁴³²

Courts, in turn, might elect to assess the benefits that a facility could bring to a community, such as increases in tax revenues,⁴³³ em-

ness of steamship clerks). The *Donnelly* court stated that "Section 2000e-2(k)(1)(A) was designed to codify the concepts of 'business necessity' and 'job relatedness' as they existed before . . . *Wards Cove* . . ." See *Donnelly*, 929 F. Supp. at 593. The court inferred that, because the language of an earlier version of the 1991 Act ("required by necessity") had been altered to read "consistent with business necessity," Congress "meant to require something less than a showing of indispensability." See *id.* (quoting 42 U.S.C. § 2000e-2(k)(1)(A)(i)). The *Donnelly* court additionally noted that if the defendant was required to show that the practice in question was indispensable, then no alternative less discriminatory practice could exist, rendering the next provision of the 1991 Act meaningless. See *id.*; see also *supra* text accompanying note 363.

⁴²⁹ See *supra* text accompanying notes 424–28.

⁴³⁰ See, e.g., *Young v. Montgomery County Bd. of Educ.*, 922 F. Supp. 544, 551–52 (M.D. Ala. 1996); *New York Urban League v. New York*, 71 F.3d 1031, 1039 (2d Cir. 1995). A permitting authority may raise benefits such as increased jobs and tax base for the community. However, it seems doubtful that a court will accept such a justification because these benefits are in no way related to the goals of the issuer of an environmental permit. See *supra* text accompanying note 425.

⁴³¹ See *Elston*, 997 F.2d at 1413–14. In a facility siting case, zoning restrictions may be especially important in this regard.

⁴³² See *Coalition of Concerned Citizens Against I-670 v. Damian*, 608 F. Supp. 110 (S.D. Ohio 1984). The court found that the defendants had legitimate non-discriminatory reasons for siting a highway based on project momentum (ten years of planning) and geography (six million dollars of property had already been purchased through eminent domain). See *id.* at 113; see also *Fisher*, *supra* note 2, at 326. It should be noted that in most facility siting cases it will not be the defendant state or municipal agency that has invested funds, but a non-party private business interest. Further, if a challenge is brought immediately after a permit is issued, it is less likely that considerable time and funds already will have been invested in the project. See *id.* at 327.

⁴³³ See Brief of Amicus Curiae Chamber of Commerce of the United States of America, National Black Chamber of Commerce, Inc., and Pennsylvania Chamber of Bus. and Indus. at 24, *Seif v. Chester Residents Concerned for Quality of Living*, (U.S. 1998) (No. 97–1620). The amicus brief specifically references a predominantly African-American community in Sumter County, Alabama, which hosts the "largest hazardous waste landfill in the country." See *id.* at 25. The brief contends that for four decades before the landfill was built, the population of Sumter declined by 40% and the remaining residents experienced one of the highest levels of poverty, illiteracy, and infant mortality in the state. See *id.* Since

ployment, economic prosperity, and the attendant positive health effects of these economic improvements.⁴³⁴ However, questions remain. For courts to consider "justification" effectively, would they need to have information about the facility's potential risks and a method for balancing the alleged harms against its proposed benefits, or does justification stand independent of the harm alleged?⁴³⁵ Is there a level of harm for which no justification can be made? What criteria will courts use in determining when a benefit has outweighed a burden? The plaintiff's prima facie case does not appear to require any type of evidence related to a risk assessment,⁴³⁶ therefore, courts may have difficulty judging what level of "justification" is needed.

4. Less Discriminatory Alternative

Under Title VI, if the defendant permitting authority is able to rebut the plaintiff's prima facie discriminatory impact case by showing a legitimate, non-discriminatory reason for issuing the challenged permit, the burden then shifts back to the plaintiff.⁴³⁷ The plaintiff may then overcome the defendant's rebuttal by showing the proffered justification was actually a pretext for racism,⁴³⁸ or by presenting evidence of a less discriminatory alternative to the permitting authority's policy or action that would serve the agency's legitimate interest in an efficient and feasible manner.⁴³⁹ One circuit court has found that proving a pretext for racism will require a showing that a discriminatory animus motivated the permitting authority's siting decision.⁴⁴⁰

the landfill's opening, however, tax revenues have enhanced infrastructure, educational opportunities, and health care delivery systems in the community, dramatically reducing illiteracy and infant mortality rates. *See id.*

⁴³⁴ *See id.*

⁴³⁵ *See generally* Mank, *Equitable Compensation*, *supra* note 422, at 333 (proposing "a risk-based approach to representing and compensating . . . any person affected by a siting decision").

⁴³⁶ *See, e.g.*, U.S. EPA Region 5, *Environmental Risk: Your Guide to Analyzing and Reducing Risk* (Oct. 1991) <<http://www.epa.gov/reg5oopa/risk.htm>>.

⁴³⁷ *See* 42 U.S.C. § 2000e-(k) (1) (A) (ii) (Supp. 1991).

⁴³⁸ *See* Colopy, *supra* note 66, at 161 & n.160-61 (citing Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985)).

⁴³⁹ *See* Albermarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); *see* Fisher, *supra* note 2, at 325; *see also* Colopy, *supra* note 66, at 164. The defendant must have been afforded the opportunity to adopt the plaintiff's proposals for alternative practices and must have refused to do so. *See* 42 U.S.C. § 2000e-(k) (1) (A) (ii); *see also* Colopy, *supra* note 66, at 164 n.177.

⁴⁴⁰ *See* Elston v. Taladega County Bd. of Educ., 997 F.2d 1394, 1413 (11th Cir. 1993) (finding that, since there was no evidence that discriminatory animus motivated the school

Plaintiffs historically have found evidencing this level of intent to be formidable and, thus, plaintiffs may be unable to show pretext in future cases.⁴⁴¹

In presenting a less discriminatory alternative to the court, plaintiffs may assert feasible alternate project sites that will "eliminate or sharply reduce negative impacts" on minority communities.⁴⁴² However, if the defendant has already established that selecting the challenged site was reasonably necessary because of a lack of acceptable alternative locations, plaintiffs will have great difficulty winning this argument.⁴⁴³ Plaintiffs will increase their likelihood of successfully proposing alternate sites by taking action early in the permitting authority and permittee's decision making process, so as best to influence the parameters of alternatives considered.⁴⁴⁴ Related to proposing alternate locations, plaintiffs might be able to succeed by challenging the necessity of the project per se, arguing that the function of a "necessary" facility can be performed another way, or perhaps not at all.⁴⁴⁵ This strategy may be the only option open if the de-

district's decision not to build in a minority neighborhood, the plaintiffs could not show that the location decision was pretextual).

⁴⁴¹ See *supra* text accompanying notes 56-63.

⁴⁴² See Fisher, *supra* note 2, at 328 (citing Plaintiff's Complaint at 31-32, Clean Air Alternative Coalition v. United States Dept. of Transp. (N.D. Cal. 1993) (No. C-93-0721-VRW)).

⁴⁴³ See generally Coalition of Concerned Citizens Against I-670 v. Damian, 608 F. Supp. 110 (S.D. Ohio 1984).

⁴⁴⁴ See Fisher, *supra* note 2, at 327-28. A plaintiff's ability to do so, however, may depend on when in the life of the project suit may be brought. See *supra* notes 129-30 and accompanying text.

⁴⁴⁵ See *id.* at 328. Frequently, legal and financial considerations have forced creative alternatives to pollution generation that was once thought necessary. See *id.* Fisher offers the following example:

[I]n the early 1970s, the oil industry opposed phasing lead out of gasoline, arguing that such a measure would cost seven cents a gallon, or \$7 billion a year. In 1990, with the phase-out 99% complete, actual costs had proven to be 95% lower than the industry estimate, due to technological innovation.

Id. Fisher also cites the result of the recent Supreme Court decision of *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 333 (1994), which classified municipal incinerator ash as hazardous waste under certain EPA criteria. See *id.* In that case, the City of Chicago argued that there was no feasible alternative to producing lead and arsenic bearing ash other than closing all the city's incinerators. See *id.* However, following the Court's ruling that the ash had to be disposed of as hazardous waste with the attendant extra expense, the city announced that it would keep its facilities open and would separate the lead and arsenic bearing items from the waste, creating a non-hazardous ash product. See *id.*

fendant has successfully proven that there are no other sites for the challenged facility.

C. Remedies and Appropriate Relief

Under Title VI, it is clear that plaintiffs who successfully prove disparate impact may be granted injunctive and declaratory relief⁴⁴⁶ and reasonable attorney's fees.⁴⁴⁷ However, in the early to mid-1990s, commentators disagreed as to whether monetary damages might also be available, or whether such damages necessitated a showing of intentional discrimination.⁴⁴⁸ The weight of recent case law affirms that

⁴⁴⁶ See *Guardians Ass'n v. Civil Serv. Comm'n of NY*, 463 U.S. 582, 599–602 (1983); see also *Colopy*, *supra* note 66, at 165 (stating that declaratory and injunctive relief are available once disparate impact is proven); *Fisher*, *supra* note 2, at 329 (reporting the availability of declaratory and injunctive relief upon a successful demonstration of disparate impact); *Lazarus*, *supra* note 7, at 836 (cautioning that “[u]ntil recently, it seemed fairly well settled that in the absence of a showing of discriminatory intent, equitable relief was the only remedy available to redress a Title VI violation.”); *Mank*, *Equitable Compensation*, *supra* note 422, at 384 (instructing that “[u]ntil recently, it appeared that Title VI provided only equitable relief . . .”).

⁴⁴⁷ See Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988(b) (Supp. 1991). Plaintiffs may not bring an action solely to collect fees expended in a separate Title VI administrative action. See *Colopy*, *supra* note 66, at 166 n.194 (citing *North Carolina Dep't of Transp. v. Crest St. Council*, 479 U.S. 6, 12–16 (1986)). Plaintiffs additionally cannot recover fees for actions brought against the federal government because the Awards Act does not expressly waive sovereign immunity. See *id.* (citing *Shannon v. United States*, 433 F. Supp. 249, 251 (E.D. Pa. 1977)). Finally, in calculating recoverable attorney's fees, the Supreme Court has disallowed the inclusion of experts' fees in a Title VI suit. See *Fisher*, *supra* note 2, at 324 n.202 (citing *West Virginia Univ. Hosps. v. Casey*, 499 U.S. 83, 102 (1991)).

⁴⁴⁸ See *Colopy*, *supra* note 66, at 165 (asserting that Title VI plaintiffs cannot receive compensatory relief without a showing of intentional discrimination); *Fisher*, *supra* note 2, at 329 (observing that damages “seem precluded” except where intentional discrimination is found). These views seem to match those expressed by the Court in *Guardians*. See 463 U.S. at 612 (White & Rehnquist, JJ.); *id.* at 615 (O'Connor, J., concurring); *id.* at 608–10 (Powell, J., & Burger, C.J., concurring); see also *id.* at 607 n.27 (White, J.) (stating the a majority of the court “would not allow compensatory relief in the absence of proof of discriminatory intent.”); *Eastman v. Virginia Polytechnic Inst.*, 939 F.2d 204, 206–07 (4th Cir. 1991) (stating that *Guardians* held that “intentional discrimination is a prerequisite to an award of any sort of ‘compensatory damages’ to a private litigant in a Title VI case.”). But see *Lazarus*, *supra* note 7, at 836 (reasoning that “it would seem fair to assume that a damages remedy is now generally available for Title VI violations, even absent a showing of discriminatory intent.”). *Franklin v. Gwinnett County Public Schools* inspired a period of uncertainty surrounding the availability of monetary damages for nonintentional violations of Title VI by stating that, a “clear majority [of Justices in *Guardians*] expressed the view that damages were available under Title VI in an action seeking remedies for an intentional violation, and no Justice challenged the traditional presumption in favor of a federal court's power to award appropriate relief in a cognizable cause of action.” See 503 U.S. 60, 70 (1992). The broad language regarding “power to award appropriate relief” seems to

courts are limiting compensatory damages to intentional violations of Title VI.⁴⁴⁹

One commentator has suggested that courts' limitations on monetary damages in disparate impact cases may ultimately prove advantageous to environmental justice advocates as the equitable redistribution of environmental burdens is central to such claims and this distinction forecloses the possibility of a damage judgment in lieu of redistribution.⁴⁵⁰ Although siting challenges frequently focus on a particular permit, because community groups generally seek institutional change, plaintiffs may prefer to craft the relief requested not only to enjoin the permit in question, but to address the entire permitting process of the municipal or state authority.⁴⁵¹

have caused confusion as to whether monetary remedies are truly limited to intentional violation of Title VI. *See, e.g., Sandoval v. Hagan*, 7 F. Supp. 2d 1234, 1276 n.41 (M.D. Ala. 1998).

⁴⁴⁹ *See, e.g., Smith v. University of Washington Law Sch.*, 2 F. Supp. 2d 1324, 1337 (W.D. Wash. 1998); *Ferguson v. City of Phoenix*, 931 F. Supp. 688, 697 (D. Ariz. 1996), *aff'd*, 157 F.3d 668 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 2049 (U.S. 1999). The district court in *Ferguson* cited several district court cases for its finding that "post-Franklin cases have uniformly held that compensatory damages under Title VI are available, but only for intentional violations of the act." *Id.* (citing *Tafoya v. Bobroff*, 865 F. Supp. 742, 749 (D.N.M. 1994); *Tyler v. City of Manhattan*, 849 F. Supp. 1442, 1444 (D. Kan. 1994); *Miller v. Spicer*, 822 F. Supp. 158, 166-68 (D. Del. 1993)).

Ferguson leaves open the possibility that this limitation on monetary damages may not necessarily preclude compensation for disparate impact claims, however, if the plaintiff is able to establish that the fund recipient was aware through continuing and knowing violations that its facility siting policies evinced intentional discrimination. *See Ferguson*, 931 F. Supp. at 697. *Ferguson* does not reach a conclusion of the issue and does not address the level of proof necessary for a court to find that a policy that caused a disparate impact amounted to intentional discrimination for the purposes of the act. *See id.* However, the court does caution that when one applies the standard of intentional conduct under 42 U.S.C. § 1983 "the inquiry collapses into a search for evidence of . . . deliberate indifference." *Id.* Therefore, it is difficult to imagine a case that could support a finding of "intentional" disparate impact, but not discriminatory treatment. Thus, monetary damages appear unavailable in disparate impact cases under Title VI.

⁴⁵⁰ Fisher, *supra* note 2, at 329.

⁴⁵¹ *See, e.g., Plaintiffs' Complaint* at 35-39, *Chester Residents Concerned for Quality Living v. Seif*, 944 F. Supp. 413 (E.D. Pa. 1996) (No. 96-3960) (requesting: (1) declaratory judgment against PADEP for violation of Title VI for operation of its waste permit application program in manner that causes a discriminatory effect; (2) rescission of the permit issued to SRS; (3) injunction against PADEP requiring a revision of its criteria for reviewing waste permit applications designed to prevent the granting of permits which have a discriminatory effect; (4) injunction against PADEP from receiving federal funds from EPA until the court approves PADEP's revised permitting criteria; (5) a temporary restraining order staying the SRS waste facility permit; (6) additional relief as the court determines to be equitable; and (7) plaintiff's court costs including reasonable attorney's fees and experts' fees). *See also Fisher, supra* note 2, at 329.

However, such a request for barring a facility and for an agency-wide evaluation of permitting procedure may be met with judicial resistance.⁴⁵²

[C]ommentators studying existing environmental racism litigation have noted that as a practical matter, while the judiciary is willing to find for plaintiffs in cases that involve the provision of a social "good," [such as forcing the implementation of a program to detect and treat lead poisoning in children]⁴⁵³ the courts seem reluctant to make decisions regarding the placement of a social "bad" like a [locally undesirable land use].⁴⁵⁴

What remains to be seen is whether courts will be willing to step into this "social engineering" role in the face of what will undoubtedly amount to great negative pressure from local government and business concerns.⁴⁵⁵

To meet a court's potential reluctance to order institutional change, Title VI plaintiffs should look to *Franklin v. Gwinnett County Public Schools*⁴⁵⁶ in which the Supreme Court intimated that courts may have some flexibility in fashioning remedies for civil rights plaintiffs.⁴⁵⁷ In *Franklin*, the Court affirmed the rule that "absent clear direction to the contrary by Congress, federal courts have the power to award any appropriate relief"⁴⁵⁸ for violation of a federal statute. Find-

⁴⁵² See Fisher, *supra* note 2, at 331.

⁴⁵³ See *Matthews v. Kizer*, No. C-90-3620-EFL (N.D. Cal. filed Dec. 20, 1990) (class action complaint, parties later changed to *Matthews v. Coyle*).

⁴⁵⁴ Fisher, *supra* note 2, at 331.

⁴⁵⁵ See *supra* note 300; see also *supra* notes 126-27 and accompanying text.

⁴⁵⁶ 503 U.S. 60 (1992).

⁴⁵⁷ See Colopy, *supra* note 66, at 165 & n.188 (discussing *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 74-75 (1992), as not allowing monetary damages for unintentional violations of Title IX in that the federal fund recipient does not have notice that it will be liable for such damages. The notice issue does not arise where nonintentional discrimination is charged.); see also *supra* note 448. While ruling that compensatory damages are appropriate only for intentional discrimination under Title IX, the Court in *Franklin* referenced two amendments to Title IX (the Civil Rights Remedies Equalization Act of 1987, 42 U.S.C. § 2000d-7 (1988) and the Civil Rights Restoration Act of 1987, 20 U.S.C. § 1687 (1988)) as indicators that Congress did not intend to limit the general rule that "federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to federal statute." See *Franklin*, 503 U.S. at 71-72; see also Colopy, *supra* note 66, at 165-66. "Congress made no effort [in the 1986 Amendment] . . . to alter the traditional presumption in favor of any appropriate relief for violation of a federal right. We cannot say, therefore, that Congress has limited the remedies available to a complaint in a suit brought under Title IX." *Franklin*, 503 U.S. at 73 (alterations in original).

⁴⁵⁸ *Franklin*, 503 U.S. at 70.

ing no such contrary direction, the Court directed the lower court to fashion a remedy that best addressed the plaintiff's injuries.⁴⁵⁹ However, it is questionable whether this language could be construed broadly enough to empower courts to mandate the adoption of new policies as a part of injunction.⁴⁶⁰

Offering a more conservative view, another commentator suggests plaintiffs meet a court's reluctance to redistribute environmental burdens by stressing Title VI's "uncompromising non-discriminatory commands."⁴⁶¹ Advocates could reassure the court that it will not be passing judgment on where local authorities must site a facility, or even whether it must be built at all, but instead will simply be holding that the challenged facility cannot be located in the plaintiff's community.⁴⁶² However, because the Third Circuit did not address remedies in *Chester*, no facility siting cases have reached the issue.⁴⁶³ Should a private right of action be found under Title VI for disparate impact, it remains to be seen how far courts will go in fashioning an appropriate remedy for a prevailing plaintiff's injury.

CONCLUSION

President Clinton's Executive Order No. 12,898 appears to envision a country where minority communities that are overburdened with potentially harmful industrial facilities will have a meaningful form of review and relief for what amounts to discrimination on the basis of race. Five years ago, the President mandated that Title VI of the Civil Rights Act of 1964 would be the tool by which this justice would be accomplished. Perhaps the only thing that is clear today about discriminatory effect claims for environmental injustice brought under Title VI is that they cannot presently achieve this goal.

⁴⁵⁹ See *id.* at 75-76; see also Colopy, *supra* note 66, at 166 n.193.

⁴⁶⁰ Could an injunction requiring broad institutional restructuring mandate permitting authorities to account for factors that may be prohibitively expensive for individual plaintiffs or community groups to investigate such as community health risks and cumulative effects of facility siting? Similarly, could an injunction require increased community involvement in the permitting authority's siting considerations, bringing an effective minority voice into the discussion regarding the distribution of necessary environmental burdens?

⁴⁶¹ Fisher, *supra* note 2, at 331.

⁴⁶² See *id.*

⁴⁶³ See *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925, 935 n.15 (3d Cir. 1997) (stating that, although it is "well established that private plaintiffs do not have the authority to compel a termination of [federal] funding, we make no determination at the time as to what alternative remedies offer appropriate relief for plaintiffs who prevail in actions to enforce agency regulations brought pursuant to section 602").

EPA regulations promulgated under Section 602 of Title VI, which were created to address such disparate effects, are not satisfying their stated aim of ensuring distributional equality. EPA has had a long history of inadequate Title VI enforcement and its administrative remedy is currently hampered by the Interim Guidance, which is ambiguous as written and appears to have no “bite” as applied. Without an effective administrative cure, whether affected minority communities can seek private enforcement of these regulations in federal court is of critical importance to frustrated communities.

However, even if courts recognize an implied private right of action to enforce agency regulations under Title VI, they will have to develop an effective disparate impact jurisprudence particular to facility siting before plaintiffs will have a tool for achieving environmental justice. Siting LULUs is fraught with complex considerations that touch upon economic, racial, health, social, environmental, geographic, and political realities. Courts will need to determine which of these issues they will consider, and how those considerations will be balanced.

While existing Title VI and VII decisions can help outline the parameters of how courts may decide to weigh these equities in environmental justice claims, Congress and the federal courts have had thirty-five years to grapple with civil rights issues particular to education and employment. Comparatively, discriminatory siting of objectionable facilities is in its infancy as a civil rights issue. How the law resolves questions unique to environmental justice—including health risks, cumulative impacts, existing community vulnerabilities, potential economic benefits, and appropriate remedies—will ultimately determine whether disparate impact lawsuits under Title VI will serve as an effective tool for working towards environmental justice.